

# CONFLICTING DUTIES OF INTERNATIONAL LAW AND NATO MEMBERSHIP

## A NORMATIVE ANALYSIS OF A PARLIAMENTARY RESOLUTION CONCERNING NORWEGIAN PARTICIPATION IN OUT-OF-AREA OPERATIONS

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THESIS FOR THE CAND. POLIT. DEGREE  
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NOVEMBER 2002



# ACKNOWLEDGEMENTS

I have had many helping hands while writing this thesis.

I am particularly indebted to my supervisor Raino Malnes and thank him for many useful comments and advices and for inspiring supervising.

A substantial part of this thesis was written while I enjoyed a student scholarship at the International Peace Research Institute in Oslo (PRIO). I thank the whole institute for an inspiring and interesting environment. Many thanks to Henrik Syse who gave useful comments to several chapters. Thanks also to Gregory Reichberg who commented an early version of chapter 3 and to Håvard Hegre and Dan Smith who commented an early version of chapter 4. PRIO's librarian Odvar Leine was helpful with providing necessary books and helped me in several attempts at getting hold of a NATO document, which eventually turned out impossible. I am grateful to PRIO's Ethics, Norms and Identities Programme for the opportunity to present parts of my thesis at the conference 'Globalisation of Public Space' in Lyon 14–17 June 2001.

I would also like to thank my colleagues at the Secretariat for the National Committees for Research Ethics for thoughtfulness and for comments to chapter 7 at one of our workshops. Thanks to Hilde W. Nagell for pleasant collaboration and for access to her comprehensive ethical library.

Finally, I thank four friends. Thanks to Gro Sandkjær Hanssen and Nina Gram Garmann for useful comments on several parts of the manuscript and for encouragement during the entire process. A special thanks to Pia Kristine Lang for many useful comments and invaluable support in finalising the thesis. And many, many thanks to Tore Thallaug for valuable inputs, kind support and for always being there for me.

Oslo, 8 November 2002

Micheline Egge Grung

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# 1 INTRODUCTION

## 1.1 The parliamentary resolution of 6 December 1994

On 6 December 1994, the Norwegian parliament – the Storting – passed a resolution that approves of Norwegian participation in military operations for NATO that are undertaken beyond the territory of NATO (out-of-area operations) even in cases when the United Nations' Security Council has not authorised such action (Beslutning S. nr. 2, 06.12.94).<sup>1</sup> Until this resolution was passed, Norway's policy had been that out-of-area operations would only be undertaken upon Security Council authorisation. The parliamentary resolution, therefore, represents an abrupt shift in Norway's official foreign and defence policy: Norway no longer considers itself – or NATO – restricted by a lacking Security Council mandate for the conduct of out-of-area operations. This policy was sealed in March 1999, when Norwegian aircrafts participated in NATO's bombing of Kosovo, Serbia and Montenegro despite the lack of an explicit Security Council mandate.

The precise content of Beslutning S. nr. 2, 06.12.94 is given by the wording of the Defence Committee's recommendation to the Storting (Innst. S. nr. 23 (1994–95): 5, my translation)<sup>2</sup> which the Storting adopted:

[N]orway must adhere to the principle that Norwegian participation in military operations outside of NATO's and the WEU's areas of responsibility takes place on the basis of a UN or a CSCE<sup>3</sup> resolution. Any potential Norwegian military participation in humanitarian operations, rescue operations or peace operations without a formal mandate from the UN or the CSCE, but in accordance with the principles of the United Nations' Charter together with the principles in the Helsinki Final Act and the intentions of the Paris Declaration must be considered separately and put before the Storting.

The resolution's wording gives rise to several questions. I will clarify these questions and make some important distinctions concerning the resolution in section 1.2.3. For now, however, it suffices to note that the parliament, in principle, approved of

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<sup>1</sup> Stortingsforhandling 6. desember 1994 [Official report of the proceedings of the Storting 6 December 1994] pp. 1530–1554, henceforth Stortingsforhandling 06.12.94.

<sup>2</sup> Innst. S. nr. 23 (1994–95) Innstilling fra forsvarskomiteen om bruk av norske styrker i utlandet [Recommendations from the Defence Committee concerning the use of Norwegian forces abroad]. All translations from Norwegian to English are my own.

<sup>3</sup> Conference on Security and Co-operation in Europe, from 1 January 1995 Organisation for Security and Co-operation in Europe (OSCE).

Norwegian participation in NATO out-of-area operations that are undertaken without a Security Council mandate.

Beslutning S. nr. 2, 06.12.94 was passed with dissenting votes. The Conservative Party and the Progress Party, which are both right-wing parties, the Liberal Party, which belongs to the political centre and the Labour party constituted a majority voting in support of the cited resolution. The two other centrist parties, the Centre Party and the Christian Democratic Party, and the left wing, the Social Left Party and Red Electoral Alliance, voted against participation in out-of-area operations in cases of a lacking Security Council mandate.

The dissent reflects opposing views about Norway's moral obligations. As I will demonstrate in section 2.3, the majority grounded its position that Norway should participate in non-UN-mandated out-of-area operations primarily on an assumption that Norway's membership in NATO requires that Norway undertake this kind of task. Norway, being a NATO member, is required to make contributions to the alliance. The NATO summit in Brussels in January 1994 established that international peace operations constitute one of NATO's principal tasks in the years to come. This, it was argued, implies that Norway is obligated towards NATO to participate in out-of-area operations irrespective of the existence of a Security Council mandate.

One of the assumptions that the minority grounded its position on, however, is that participation in the mentioned kinds of military operations represents a violation of the UN Charter. What the minority has in mind is presumably chapter VII in the Charter, which gives the Security Council a primary responsibility for international peace and security. Since Norway ratified the Charter in 1945, there is reason to suspect that Norway by declaring that it will participate in out-of-area operations despite the lack of a Security Council mandate renders itself guilty of violation of the Charter.

The Storting's dissent points to a moral dilemma. Norway should both adhere to the rules concerning the resort to military force in international law and to undertake its obligations as a NATO member. In the case at hand, both the parliamentary debate and vote suggest that the requirements of international law and the requirements of membership in NATO are incompatible. It should be noted that this tension in



Norway's foreign relations has not abated since. Both the bombing of Kosovo in 1999 and the events in the wake of the terrorist attacks against World Trade Center and the Pentagon on 11 September 2001 suggest that Norway's obligations as a NATO member and its obligations under international law conflict: The Security Council did not formally approve neither of NATO's bombing in Kosovo nor of the American military operation in Afghanistan, which NATO supports both politically and logistically.<sup>4</sup>

Of importance here, however, is that by having decided that Norway will participate in non-UN-mandated out-of-area operations, the Norwegian parliament solved what appears to be a moral dilemma in favour of the requirements of NATO membership. Beslutning S. nr. 2, 06.12.94 represents the first political step towards a policy according to which the Security Council's approval for undertaking out-of-area operations is given secondary importance.

Beslutning S. nr. 2, 06.12.94 was passed almost without public attention. Eight days earlier, on 28 November, the Norwegian people had voted against membership in the European Union in a referendum. Most public debate was centred round the implications of the Norwegian people's no. Despite the fact that the EU referendum had just taken place, it is surprising that the decision to participate in non-UN-mandated out-of-area operations did not enjoy more public attention. Although the parliamentary resolution and NATO's bombing in the spring of 1999 are separated by roughly four years only, it was unlikely that NATO would undertake military action beyond its geographical boundaries without the Security Council's approval in 1994. Throughout NATO's involvement in the war in the former Yugoslavia, which had just begun when the resolution was passed, NATO saw the UN's role in conferring the alliance legitimacy in conducting military operations as crucial (Smith 1996: 36–37). In light of NATO's security political context, therefore, the Norwegian parliamentary resolution is somewhat unintelligible.

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<sup>4</sup> On 12 September 2001, the North Atlantic Council made the following statement: 'If it is determined that [the appalling attacks perpetrated against the United States] was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty' (North Atlantic Council 2001). Article 5 constitutes the cornerstone of the North Atlantic Treaty and establishes the allies' mutual defence commitment: An attack against one member is considered as an attack against all members. For the first time in NATO's history, Article 5 was invoked. Neither the United States nor NATO sees the lack of a Security Council mandate as problematic: The military operation is conducted on the basis of an assumed right to self-defence. I will have more to say of the international right to self-defence in chapter 4.

## 1.2 Research question, rationale, aim and scope

This dissertation has an evaluative purpose. The aim is to determine whether the resolution passed by the Norwegian parliament on 6 December 1994 is morally justifiable. My research question is the following:

*Did the Storting pass a morally justifiable resolution when it decided that Norway was going to participate in NATO out-of-area operations that were about to be undertaken without a mandate from the United Nations Security Council?*

As mentioned in the previous section, the Storting's main reason for passing Beslutning S. nr. 2, 06.12.94 was the assumption that Norway has an obligation towards NATO to participate in out-of-area operations. It was also noted that the minority voted against the resolution on the assumption that it constitutes a violation of the UN Charter. For reasons that I return to in section 2.4, I will primarily be concerned with assessing whether Beslutning S. nr. 2, 06.12.94 represents a violation of the rules concerning the resort to military force in international law and whether Norway is obligated towards NATO to participate in out-of area operations that the Security Council has not approved of throughout this thesis. Given this scope, there will be reason to say that Beslutning S. nr. 2, 06.12.94 is justified if

- (i) Beslutning S. nr. 2, 06.12.94 does not represent a violation of the rules concerning the resort to military force in international law and<sup>5</sup> Norway is obligated towards NATO to participate in non-UN-mandated out-of-area operations, or
- (ii) Beslutning S. nr. 2, 06.12.94 represents a violation of the rules concerning the resort to military force in international law, but there were adequate reasons for having given priority to the obligation towards NATO to participate in non-UN-mandated out-of-area

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<sup>5</sup> Strictly speaking, the appendage is unnecessary. If Beslutning S. nr. 2, 06.12.94 complies with the UN Charter, there does not seem to be any reason to say that it is unjustified. However, Beslutning S. nr. 2, 06.12.94 will be superfluous if Norway is not obligated towards NATO to participate in non-UN-mandated out-of-area operations. For this reason, I have chosen to present the obligation towards NATO as a precondition for the resolution's being morally justifiable.

operations to the detriment of the obligation to adhere to rules of international law.

The research question, being normative, requires that I conduct a normative analysis. While positive analysis consists in description and explanation, the purpose of normative analysis is to assess the degree to which particular actions, practices and institutions are justified from a moral point of view. However, normative and positive analyses are not only different in terms of purpose, they also proceed differently. I will return to the important issue of how normative analysis should be conducted in the next chapter. Firstly, however, I am going to dwell on another important issue, namely the reasons why I am subjecting Beslutning S. nr. 2, 06.12.94 to normative analysis. Is it at all fruitful to explore the moral grounds of political decisions? What can normative analysis actually reveal?

#### 1.2.1 Moral considerations and political decisions

In 416 BC, in the sixteenth year of the Peloponnesian War, imperial Athens sought to take over the island state of Melos. In *The History of the Peloponnesian War*, Thucydides tells us that Athens sent a large force to the island. Before commencing hostilities, however, the Athenians sent envoys ahead to persuade the Melians to surrender without a fight. They proposed to spare Melian lives at the expense of their freedom (Bulletin of Atomic Scientists 2002).

Thucydides has reconstructed a dialogue between the Athenian generals Cleomedes and Tisias and the magistrates of Melos. Through the dialogue, Thucydides presents Athens' claim to Melos as a 'necessity of nature' (Walzer 1977/92: 5). Cleomedes and Tisias argue that Melos must surrender because its neutrality 'will be an argument of our weakness, and your hatred of our power, among those we have rule over' (quoted in Walzer 1977/92: 5). Melos' neutrality would inspire rebellion throughout the islands. Despite a near-certain defeat, however, the Melians fought for their independence. The men of Melos were eventually killed, the women and children sold into slavery, and the island repopulated by Athenians.

In Michael Walzer's (1977/92: 7) interpretation of Thucydides' historical reproduction, Thucydides argues that resort to force and the conduct of war forms a realm of its own, with laws that are distinct and separate from the laws of moral life. To Thucydides, moral arguments have no relevance for decisions concerning the resort to lethal force and the conduct of war in particular and political decisions in general. Political decisions should be taken irrespective of their moral implications. This standpoint is generally known as political realism, and today, about 2400 years after Thucydides' time, it still has proponents. An important opposing normative position holds that political decisions, just as any other actions, should have a moral basis. The underlying assumption is that there is no justification for doing what is morally wrong. Can Thucydides be right when he argues that the decision to go to war against Melos must be taken irrespective of moral considerations? In the following, I will attempt to demonstrate that there is no reason to listen to the argument that morality and politics have nothing to do with one another.

Politics is about making and implementing decisions. Political decisions, also those relating to foreign affairs, are taken in order to direct society in specific directions. Political decisions, therefore, result both from the visions or goals that political decision-makers have for society and from their ideas about how the goals are achieved. Since political decisions are meant to direct society in specific directions, they are carriers of *reasons* to pursue a particular course of action. This implies that arguments must be important to politics.

Arguments about feasibility, about how political goals actually can be achieved, have a prominent place in most public debates. Presumably, the prospect of actually defeating Melos was decisive for the Athenians. Such arguments are important because political decisions should direct society in specific directions. This implies that political arguments, to succeed, must be effective when it comes to influencing beliefs and actions (Malnes 1992: 118).

If one allows the practical impact to count for everything, however, the success of a political argument will not at all depend on its logical and analytical qualities. Hence indoctrination will be as good as persuasion. This implies that political arguments should be held to another standard of success as well: to their *analytical*

qualities (Malnes 1992: 117). In other words, political arguments must also be rationally convincing to succeed. To what degree can political arguments be rationally convincing if they are detached from moral arguments? Let us return to the arguments of the Athenian generals.

What characterises the Athenian generals' arguments for going to war is the lack of moral considerations. Their arguments rest on empirical assumptions uniquely: The risk of loosing the Athenian empire is in itself a sufficient reason to wage war against Melos. In Cleomedes' and Tisias' opinion, there simply are no other alternative actions as the Athenian empire is at stake. They are in fact saying that to resort to force is something Athens cannot be held responsible for because the choice is with Melos: The island state can either surrender or it must face the Athenian troops.

It might well be that the Athenian generals are right when they claim that Melos' neutrality could inspire rebellion throughout the islands. But even if one assumes that the whole empire could be lost if Melos is left to remain neutral, there will be something unsatisfactory about the Athenian generals' arguments. Naturally, the option of not invading Melos remained. This means that there are no good reasons for giving the Athenian generals' arguments particular importance. Rather, there is reason to believe that the lack of moral considerations explains why the arguments put forward by Cleomedes and Tisias are not convincing: It seems that they pledge the argument of necessity in order to disclaim responsibility for actions for which Athens actually will become responsible. As Michael Walzer notes, 'the proverb 'all's fair' is invoked in defense of conduct that appears to be unfair' (1977/92: 4). In this case, the proposed arguments have not succeeded as political arguments as they are not rationally convincing.

Although the case of Melos demonstrates the relevance of moral arguments for politics, this does not imply that moral arguments are equally important in all spheres of politics. As mentioned above, political decision-makers must take into account arguments about effectiveness; about actually achieving political goals. When it comes to decisions concerning the resort to military force, however, political decision-makers cannot escape moral considerations. As such decisions concern life and death and

often terminates in severe human suffering, arguments about effectiveness cannot count for all.

As noted above, Beslutning S. nr. 2, 06.12.94 was passed on an assumption that Norway is obligated towards NATO to participate in non-UN-mandated NATO out-of-area operations. Is there reason to examine whether the resolution is morally justifiable when the members of parliament seem to have recognised the relevance of moral considerations? In the next section I am going to show that such reason exists by explaining what I consider to be the purpose of normative analysis.

### 1.2.2 The purpose of normative analysis

In this section I will account for two different approaches to what normative analysis can reveal. These approaches go back to the dispute between Socrates and Protagoras in antiquity (Malnes 1992: 118–119). Both Protagoras and Socrates observed that people often have diverging conceptions about right and wrong. Protagoras believed that disputes in moral matters do not express genuine disagreement. Quite the contrary, he believed that people tend to share the same moral values. Disagreement expresses bewilderment. Socrates, on the other hand, believed that disputes about right and wrong arise because people actually have diverging conceptions, and he believed disagreement could be dangerous: ‘Disagreement about the just and unjust, the fine and shameful, the good and bad [will] give rise to enmity and anger’ (quoted in Malnes 1992: 119). Accordingly, he believed that one must go to the root of the disagreement.

Michael Walzer is a contemporary proponent of the first view. In his opinion, disputes about right and wrong are in fact evidence that people have a moral understanding in common: ‘Had there been no common meanings, there could have been no debate at all’ (Walzer 1977/92: 11). When people appear to disagree in moral matters, it is because their moral compass needle is out of course. Particularistic interests, for example, can disturb people’s true conceptions about right and wrong. Since people in general have concurrent conceptions in moral matters, normative analysis, to Walzer, should not be about constructing new ethical principles, but in *interpreting* what already exists: One should ‘interpret to one’s fellow citizens the

world of meaning that we share' (1983: xiv). Normative analysis can only reveal conceptions about right and wrong that already exist. It should be noted that what Walzer presumes to exist is not necessarily clear and precise conceptions about right and wrong, but rather certain 'sensibilities and intuitions' (Walzer 1983: 28). The task of the political philosopher consists in revealing the sensibilities and intuitions that people in general have. To Walzer, therefore, normative analysis is for the most part an empirical undertaking.

According to Walzer's approach, actions, practices and institutions are evaluated by holding them to widely accepted moral ideas. If they comply with people's perceptions of right and wrong, they will be justified. This implies that the present study, to succeed, should be conducted so that it provides a precise interpretation of a set of shared meanings about Beslutning S. nr. 2, 06.12.94. In order to assess the resolution's justifiability, one should ask whether the Norwegian population consider it morally right that Norway participates in military operations that lack a UN mandate beyond NATO's geographical boundaries.

Michael Walzer's ontological assumption that people have a moral outlook in common is questionable. Is there really a 'common meaning' about the rightfulness of participating in non-UN-mandated out-of-area operations in Norwegian society to reveal? We have no reason to believe that this issue is marked by any more consensus in Norwegian society than in the Norwegian parliament. It seems, rather, that people tend not to share the same moral values. This goes for questions concerning the resort to military force in particular: The public debates that followed NATO's military operations in Kosovo in 1999 and in Afghanistan in 2001 suggest that no shared meaning exists. An investigation of the Norwegian people's beliefs would thus probably not take us further than the polarised debate in the Storting.

As Raino Malnes (1992: 121) and Anne Julie Semb (2000: 16–17) have pointed out, Walzer's problem is his unwillingness to move beyond moral conventions or ordinary beliefs. Not only does his approach appear methodologically difficult, or even impossible. It would also be unsatisfactory to evaluate actions, practices and institutions by holding them to existing moral beliefs. In evaluating the parliamentary resolution, it is not really interesting what people believe to be right or wrong. What is

interesting is whether the Storting had *good reasons* for deciding that Norway will participate in NATO out-of-area operations that lack Security Council authorisation.<sup>6</sup>

The approach that Walzer suggests is unsatisfactory in another sense as well. Moral beliefs – even widespread ones – can be unjustified. There are many examples of such beliefs that were broadly accepted in the past but that we now reject as immoral. This, one could argue, is due to historical development and the necessary change of moral conventions. Even so, it is important to move beyond existing beliefs and construct new ethical principles. It is, in short, essential to develop independent standards against which one may assess prevailing political practices and institutions.

To say that one should move beyond moral conventions does not imply that existing beliefs should play no role at all in normative reasoning, (see Semb 2000: 17). It is rather a question of what status one should ascribe them. Moral conventions may be used as *starting points* for normative analyses,<sup>7</sup> contrarily to Michael Walzer's belief that they are final products of such analyses.

Socrates was concerned that disagreement in moral matters could lead to enmity and anger. As Socrates, I take the aim of normative analysis to be that one should go to the root of the disagreement in order to determine what is really right. In subjecting Beslutning S. nr. 2, 06.12.94 to normative analysis, my purpose is not to establish what people think about the resolution, but to determine whether the members of the Norwegian parliament had good reasons for passing it. This implies that I will be concerned with investigating the *validity* of moral ideas in this thesis. By critically examining whether Beslutning S. nr. 2, 06.12.94 rests on valid moral beliefs or not, I may draw conclusions about its justifiability.

In determining whether Beslutning S. nr. 2, 06.12.94 is justified, I will critically examine those normative premises upon which it rests. This will make it possible to establish the validity of the arguments put forward by the Storting. I will propose a method for how I may proceed in order to assess the validity of those beliefs on which Beslutning S. nr. 2, 06.12.94 was passed in the next chapter. I will devote the last two

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<sup>6</sup> This remark is strongly inspired by Semb (2000: 17).

<sup>7</sup> I will have more to say of this in section 2.2 where I argue that this normative analysis should start with those arguments about right and wrong that the members of parliament put forward before passing Beslutning S. nr. 2, 06.12.94.



sections in this introduction to account for the resolution's background and to make some important clarifications and distinctions related to it.

### 1.2.3 Beslutning S. nr. 2, 06.12.94: Background

According to Norwegian constitutional law, the Storting must resolve matters in compliance with one of two possible procedures. Certain matters require that the Storting adopt a legal rule. In such cases, the Storting must divide in two chambers, the *Odelsting* and the *Lagting*. In other matters, the Storting passes its resolutions in plenary. The matter with which this thesis is concerned did not require the adoption of a legal rule, and accordingly the debate and the vote took place in plenary.

The issue – the use of Norwegian forces abroad – was prepared in the Storting's Defence Committee. The matter under consideration was a White Paper<sup>8</sup>, a document consisting of 39 pages prepared by the Government for the Storting about the use of Norwegian forces abroad. The agenda in the document is extensive. The purpose of the White Paper, the introduction explains (St.meld.nr.46 (1993–94): 3), is to

present a comprehensive policy for the use of Norwegian forces abroad. The main question is what kinds of operations it is sensible that Norway participates in, either within a UN or a NATO framework or under the auspices of other organisations that have been given the task to carry through a mandate authorised by the United Nations' Security Council.

It should be noted that the White Paper does not at any point discuss the issue of Norwegian participation in out-of-area operations without a UN mandate. This issue came up when the White Paper was discussed in the Storting's Defence Committee. The White Paper actualised one question in addition to the question of Norwegian participation in out-of-area operations that the Security Council has not mandated: Whether Norwegian military personnel should be ordered to military operations abroad. The prevailing policy was voluntariness.

I pointed out in section 1.1 that Beslutning S. nr. 2, 06.12.94 appears somewhat unintelligible in light of NATO's security political challenges. I explained that at the time the resolution was passed, the UN played an important role in conferring NATO legitimacy in conducting military operations in the former Yugoslavia. Nevertheless, I

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<sup>8</sup> Stortingsmelding nr. 46 (1993–94) Bruk av norske styrker i utlandet [White Paper no. 46 (1993–94) The use of Norwegian forces abroad], henceforth St.meld. nr. 46 (1993–94).

will attempt at situating Beslutning S. nr. 2, 06.12.94 in the context of NATO's post-Cold War approach to security.

In accounting for NATO's post-Cold War approach to security it is essential to clarify the distinction between the terms 'collective defence' and 'collective security' (Yost 1998: 5). Both concepts represent attempts to impose an order on the unpredictable threats in international politics. The concepts deal, in other words, with the problem of organising relations among states for the purpose of preventing war and, if war should nevertheless break out, handle its consequences.

Collective security, in the traditional sense of the term as Immanuel Kant (1795) and Woodrow Wilson (1919) expounded it, involves a pact against war. According to Kant (1795), the only viable way to a permanent peace between nations is the establishment of a federation of free democratic states. By the end of the First World War, Woodrow Wilson believed that the future peace of the world only could be assured through the establishment of the League of Nations (Cronon 1965: lxxv). The idea of collective security was fundamental when the League of Nations came into existence in 1919.<sup>9</sup> Ideally, the pact against war should include all states in the state system. All states should be obligated to act against any aggressor because *peace is indivisible*: Every state's security interests are believed to be affected by any aggression anywhere (Yost 1998: 7–9). A collective defence pact, however, binds together an alliance of states to deter and, if necessary, defend against one or more identifiable external threats (Yost 1998: 7). From the inauguration in 1949 until the end of the Cold War, NATO's primary purpose was collective defence against the threat of Soviet aggression or coercion.

In November 1990, the members of NATO and the members of the Warsaw Pact agreed in a Joint Declaration in Paris that they were 'no longer adversaries' and that they recognised that

*security is indivisible* and that the security of each of their countries is inextricably linked to the security of all States participating in the Conference on Security and Co-operation in Europe (quoted in Yost 1998: 6, italics added).

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<sup>9</sup> Also the United Nations, which replaced the League of Nations after the Second World War, is grounded on a modified version of the idea of collective security.

In December 1991, NATO and the former Warsaw Pact States met in their new North Atlantic Cooperation Council and repeated the November 1990 declaration that ‘security is indivisible’ (Yost 1998: 6). These declarations express an aspiration towards collective security, in implying that the security of all CSCE states would be endangered by any threat to peace. This explains NATO’s goal is to create a peaceful order in the Euro-Atlantic area.<sup>10</sup> Moreover, investments, exercises and military operations and statements about NATO’s priorities have illustrated the shift in emphasis away from an almost exclusive focus on collective defence toward more attention to collective security (Yost 1998: 272). This implies that although the collective defence remains one of NATO’s purposes in the post-Cold War era, NATO has undertaken new roles beyond the collective defence embedded in the North Atlantic Treaty.

NATO’s 1991 Strategic Concept sketches the alliance’s post-Cold War security challenges. According to this concept, the post-Cold War threat is vague: ‘In contrast with the predominant threat of the past, the risks to Allied security that remain are multi-faceted in nature and multi-directional, which make them hard to predict and assess’ (NATO’s new Strategic Concept of 1991, Article 8). Moreover,

[r]isks to allied security are less likely to result from calculated aggression against the territory of the Allies, but rather from the adverse consequences of instabilities that may arise from the serious economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries in central and eastern Europe. [The tensions which may result] could [...] lead to crises inimical to European stability and even to armed conflicts, which could involve outside powers or spill over into NATO countries. (NATO’s new Strategic Concept of 1991, Article 9)

These articles explain that instability in central and eastern Europe is not only a security issue for the countries directly affected, but also for NATO. Its security challenges consist not in a threat posed towards individual member countries, but in destabilising circumstances in the geographical rim (Knutsen et al. 2000: 62). Therefore, NATO has seen it as crucial to encounter the security challenges in ‘the periphery’ (Knutsen et al. 2000: 62). The changed security environment after the Cold War explains NATO’s transformation with a redefinition of its purposes and the undertaking of new roles. According to David Yost (1998: 72), crisis management and

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<sup>10</sup> This is the territory of all CSCE (now OSCE) states, that is Canada and the United States, Europe, Turkey and the former Soviet Union states, including Siberian Russia and the former Soviet Republics in the Caucasus and Central Asia.

peace operations beyond the territory of NATO allies (out-of-area operations) is clearly one of NATO's two most significant new roles.<sup>11</sup>

11 months prior to the Storting's vote, in January 1994, the NATO Brussels summit took place. At this summit, the alliance launched the concept of Combined Joint Task Forces (CJTF) (The Brussels Summit Declaration). According to this concept, combined (multinational) and joint (multi-service) formations would conduct out-of-area operations. The CJTF were established because it was assumed that all sixteen members would be unlikely to take action together in all cases falling short of aggression against the alliance (Yost 1998: 200). Hence, the CTJF were meant to facilitate military operations through flexible and timely responses to crises (Yost 1998: 76). The importance of the CTJF concept is described in a 1994 report published by the British American Security Information Council. The report characterises the CJTF as a concept that 'may overcome some of the serious multilateral military planning nightmares (such as lack of common doctrine, planning, training and interoperability)' (BASIC 1994: 46). It impossible to establish a connection between the Brussels summit and the parliamentary vote 11 months later. Given the importance of the new concept of CJTF, however, it is not implausible that Beslutning S. nr. 2, 06.12.94 was passed as a result of the decisions taken at the Brussels summit in January 1994.

#### 1.2.4 Scope

In order to establish the scope of Beslutning S. nr. 2, 06.12.94 and hence the scope of this thesis, it is imperative to answer four questions that relate to the precise wording of the adopted resolution (see page 1):

- (i) What is the status of Beslutning S. nr. 2, 06.12.94?
- (ii) For which organisations does the Storting envisage Norway's participation in out-of-area operations?
- (iii) What is the meaning of the passage 'without a formal mandate from the UN or the CSCE'?

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<sup>11</sup> The other is co-operation with former adversaries and other non-NATO countries in new institutions such as Partnership for Peace (Yost 1998: 72).

- (iv) For what kinds of out-of-area operations does the Storting envisage Norwegian participation? That is, for what purposes will Norway participate in out-of-area operations for NATO?

The first question concerns the meaning of the passage ‘any potential Norwegian military participation [...] without a formal mandate from the UN or the CSCE [...] *must be considered separately and put before the Storting*’ (italics added). What is the status of Beslutning S. nr. 2, 06.12.94 if the Storting is to consider participation again? Does Beslutning S. nr. 2, 06.12.94 actually constitute consent to participate in out-of-area operations that are undertaken without a Security Council mandate?

It should be noted that the adopted resolution differs from the minority’s proposal in this respect. According to the minority’s proposal, participation in out-of-area operations is to take place on the basis of the UN’s or the CSCE’s request ‘*and with the Storting’s consent on every occasion*’ (Innst. S. nr. 23 (1994–95): 5, italics added). As opposed to the minority’s proposal, the adopted resolution does not say that a new parliamentary resolution is required. One interpretation of this could be that the majority meant to reduce the importance of a future parliamentary vote.

There is reason to stress that subsequent events have shown that the clause ‘must be considered separately and put before the Storting’ has had no practical significance: The decision to order Norwegian aircrafts to NATO’s bombing of Kosovo, Serbia and Montenegro in 1999 despite the lack of a UN mandate was taken by the first Bondevik Government. The decision was neither preceded by a debate nor a resolution in the Storting. The second Bondevik Government also ordered aircrafts to participate in the bombing of Afghanistan without the Storting’s consent. In other words, the Storting has demonstrated that it does not consider itself bound by the clause ‘must be considered separately and put before the Storting’. In this light, there is reason to understand Beslutning S. nr. 2, 06.12.94 as an approval *in principle* of participation in non-UN-mandated out-of-area operations.

The second question concerns for which organisations Norwegian forces will participate in out-of-area operations. Beslutning S. nr. 2, 06.12.94 says that Norway will participate in operations beyond the geographical boundaries of NATO and the WEU, but it does not establish whether Norway will participate *for* these

organisations. The introduction of the White Paper, which was cited above, envisages that Norway can participate in military operations for ‘NATO or other organisations’. Nevertheless, both the recommendation from the Defence Committee and the debate in the Storting imply that the point at issue is participation in military operations for NATO. Moreover, the events in Kosovo and in Afghanistan have shown that NATO is the only organisation that has taken those steps that Beslutning S. nr. 2, 06.12.94 envisages. For these reasons I have made the choice to exclusively explore Norwegian participation in NATO operations.

The third amplification that I would like to make relates to the passage ‘without a formal mandate from the UN or the CSCE’. In saying this, the Storting equals the authority of the CSCE (now OSCE) with that of the Security Council. The issue in question is the concept of ‘legitimate authority’, which is crucial in the Just War tradition: Which actors in the international community have the authority to take decisions concerning resort to military force? While the UN is a global organisation, the scope of the CSCE was regional.<sup>12</sup> This is one reason why the UN enjoys a special status in the international community in general and in matters concerning international peace and security in particular. Since the CSCE was a regional organisation, there is reason to question the Storting’s assumption that this organisation enjoys the competence to make decisions about military operations, even within its geographical boundaries. For reasons that I return to in chapter 3, it seems that the Storting was wrong in equalling the two organisations’ authority. Accordingly, I will be concerned with the authority of Security Council only in this thesis.

Fourth, and finally, the wording of Beslutning S. nr. 2, 06.12.94 raises the question of what *kinds of operations* Norway will participate in. According to the first sentence, the Storting’s concern is *military operations*. However, the parliament does not draw the important distinction between so-called coercive and non-coercive military operations. The distinction is important as the United Nations is founded on the idea of collective security. In its ideal form, this idea forbids the use of coercive military force, and it is articulated as a principal rule in Article 2(4) of the United Nations Charter. Non-coercive military operations are carried through on the basis of

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<sup>12</sup> The OSCE is also a regional organisation.

the consent and cooperation of the parties involved. UN's peacekeeping missions until the end of the Cold War were undertaken according to these principles.<sup>13</sup>

Coercive military operations are what we usually refer to as interventions. After the end of the Cold War, the Security Council has authorised the use of coercive military force on several occasions. The UN-authorised operations in Somalia (1992), Bosnia (1993) and Rwanda (1994) are examples of military operations of this kind. Of importance, however, is that while non-coercive military operations that are undertaken by a state or a coalition of states do not contradict the UN's ideological basis, coercive operations do. Thus in subjecting Beslutning S. nr. 2, 06.12.94 to normative analysis, my focus will be on coercive military operations.

Although I have now said that I limit my scope to participation in *coercive* out-of-area operations for *NATO*, there is reason to identify in some more detail the kinds of military operations that the Storting envisages participation in. For what purposes The second sentence in Beslutning S. nr. 2, 06.12.94 mentions humanitarian operations, rescue operations and peace operations. This implies that Norwegian participation in out-of-area operations will take place for special purposes: either for humanitarian purposes, for rescue purposes or for peace purposes. Beslutning S. nr. 2, 06.12.94 itself does not establish what such operations are, but other sources do.

The White Paper thoroughly defines different kinds of military operations that Norway might participate in.<sup>14</sup> The only concept that is not treated is rescue operations. But Defence Minister Kosmo defines rescue operations as operations that might take place in the case of a natural disaster, for example an earthquake (Stortingsforhandler 06.12.94: 1544).

According to the White Paper, 'humanitarian helping operations are carried out to put an end to people's suffering, especially in situations where the local government itself is not able to, or not willing to, provide the population with the necessary support' (St.meld. nr. 46 (1993–94): 15). Thus human suffering is set as a precondition for Norwegian participation in military operations. There is reason to believe that the

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<sup>13</sup> Such missions, which are now generally called first-generation peacekeeping, are status-quo oriented and rest on operational principles such as impartiality and the use of force only for purposes of self defence.

<sup>14</sup> The White Paper adheres to the terms 'humanitarian helping operation' and 'peace enforcement operation' while the terms 'humanitarian operation' and 'peace operation' are used in Beslutning S. nr. 2, 06.12.94. I do not see any reason to believe that the different terms express conceptual differences.

expressions ‘not able to’ and ‘not willing to’ refers to two generally assumed purposes of humanitarian operations: Either to help people who suffer dissatisfaction of basic provisions and needs or to stop systematic human rights violations. An example of a humanitarian intervention of the second kind is Operation Provide Comfort in northern Iraq in 1991. This operation was carried out to stop the Iraqi government from conducting systematic human rights violations against the Kurdish minority in the northern part of the Country. The operation Restore Hope, undertaken by the Unified Task Force in Somalia in 1992, is an example of a humanitarian helping operation that was carried out because the Somali government was unable to satisfy the population’s basic needs.

Peace enforcement operations, the White Paper explains, are conducted to ‘restore peace in a conflict area’ (St.meld. nr. 46 (1993–94): 15). The intervention that started in January 1991 to liberate Kuwait from Iraqi occupation is mentioned as an example of a peace enforcement operation. Thus in principle, a peace operation could be conducted if a state is subjected to an attack from another state. I believe that there is reason to understand Norway’s willingness to participate in so-called peace operations in a broader context as well, namely in light of NATO’s post-Cold War approach to security. Given NATO’s security political context, which I accounted for in the previous section, believe that the Storting envisaged participation in military operations conducted for the purpose of NATO’s *own* security, in addition to promoting humanitarian purposes.

### 1.3 Concluding remarks

In this introduction I have spelled out this thesis’ research question. I have explained why it is fruitful to subject Beslutning S. nr. 2, 06.12.94 to normative analysis by pointing at the relevance of morality to political life and by explaining what I take to be the purpose of normative analysis. I have also made some important clarifications concerning the parliamentary resolution for the purpose of defining its scope and hence the scope of this thesis. In the next chapter I will account for how I am going to proceed in order to answer the research question.



## 2 METHOD FOR NORMATIVE ANALYSIS

The way in which normative analysis is carried out can be decisive for its relevance to and usefulness for political life. In this chapter, I will first account for how such analysis should be conducted in order to have an impact on political decision-making (section 2.1). This section will demonstrate, for one thing, that normative analysis should proceed from issues with which people in general are concerned. Accordingly, I will account for the debate that preceded Beslutning S. nr. 2, 06.12.94 to identify considerations that were important to the political decision-makers (section 2.2). I will then explain why I have chosen to take into account two particular considerations that came up during the debate (section 2.3). In the last part of this chapter (section 2.4) I will direct my attention to the question of how I should proceed to determine whether the Storting passed a morally justifiable resolution. I will propose a method for normative analysis with the purpose of determining how one distinguishes between justified and unjustified normative statements.

### 2.1 The impact of normative analysis

It was noted in section 1.2.1 that political arguments, to succeed, must be both rationally convincing and effective when it comes to influencing people's beliefs and actions. I then explained why political decision-makers should incorporate moral considerations into decision-making processes. However, no matter how well founded they are, moral considerations can prove impossible to accomplish in practical terms. Although people – and politicians – for the most part acknowledge the existence of moral considerations, such considerations do not always have an impact on how they act. The problem is that of moral motivation.

Moral considerations are meaningful to political life if they can influence the attitudes and actions of political leaders. If such considerations did not actually affect decisions and practices, normative analyses would not be very applicable when dealing with politics. The fruitfulness of normative analysis, therefore, seems to depend upon whether such analysis can appeal to the decision-maker's moral motivation. How

should normative analysis be conducted so that they actually have an impact on political decision-making?

It is generally held that *particularistic* interests play a decisive role when people make choices (Malnes 1992: 126): Self-interest and the interests of family and friends – not the interest of the whole world – constitute main motives for acting. When one acts from particularistic interests, one can easily overlook other important considerations. It is a common belief that both individuals and politicians have an agenda of their own, where moral considerations hardly have any impact at all. For this reason, people tend to consider particularistic interests destructive for one's moral outlook and reject them. In a utilitarian perspective for instance, where actions are evaluated according to their impact on the overall welfare, acting upon particularistic interests is questionable.

There is, however, reason to take people's particularistic interests seriously, also for the political philosopher. For one thing, there can be reason to allow personal interests to override other people's interests from a moral point of view. Moral philosophy also recognises the existence of so-called special obligations; obligations towards people who stand in a particular relationship to us. Just as personal interests might override other people's interests, special obligations can override more impartial moral requirements. For present purposes, the methodological implications are important. As there seems to exist several possible legitimate bases of partiality, Malnes recommends the political philosopher to explore these possibilities: 'Normative theory is most likely to get through to people if it starts where practical deliberation normally begins: With the urge to do what is best for oneself and one's associates' (1992: 131). This methodological lesson rests on an assumption that people will be more responsive to moral argumentation if their own interests and concerns are addressed.

Will they be equally responsive if the *outcomes* – the conclusions – of normative analyses contradict their personal inclinations? Henry Sidgwick is one philosopher who assumes that people are sensitive to moral argumentation, not only personal preferences: Men and women 'commonly assume in [themselves] a determination to pursue whatever conduct may be shown by argument to be reasonable, even though it be very different from that to which [their] non-rational

inclinations may prompt' (quoted in Malnes 1992: 128–129). Thus by demonstrating 'by argument' what is 'reasonable', normative analysis can direct people's behaviour in more impartial directions. An examination of whether an action, practice or institution is justified or not might affect the way in which future actions, practices and institutions take shape because an audience that is prepared to make words into deeds exists. If Sidgwick is right, one important implication is that normative analyses are worthwhile projects, also when they foil people's personal interests.

The problem of the irrelevance of political philosophy to politics is perhaps not only one of motivation, but also of *comprehension*. As Malnes (1992: 132) explains: '[T]he more political theorists reason in terms that are unfamiliar to their audience, the less likely their arguments are to be widely comprehended and heeded'. There is a methodological lesson to be drawn from this observation as well. Normative analyses should be conducted so that people understand the considerations that are subjected to scrutiny and the way in which they are scrutinised. I will take the two methodological lessons pointed out in this section seriously: In the next section I will explore the parliamentary debate that preceded Beslutning S. nr. 2, 06.12.94 firstly, to address the representative's concerns, and secondly, to attempt at reason in terms that are well known to them.

## 2.2 The debate in the Storting

The purpose of accounting for the debate in the Storting at this early stage is to identify the considerations that the members of parliament themselves considered important when Beslutning S. nr. 2, 06.12.94 was passed. The aim is, in particular, to avoid that the normative analysis that is about to be performed proves irrelevant to political life.

The debate in the Storting started about ten o'clock in the morning of 6 December and ended just before one o'clock in the afternoon.<sup>15</sup> As mentioned earlier, the resolution was passed with dissenting votes. The dissent pinpoints some important

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<sup>15</sup> In addition to the question of Norwegian participation in non-UN-mandated out-of-area operations, the issue of ordering of Norwegian officers to military operations abroad was extensively debated.

ethical considerations. I will therefore make it my point of departure in accounting for the debate and in identifying ethically relevant considerations.

The members constituting the parliament's minority – and voting against participation in out-of-area operations that are not authorised by the Security Council – based their position on the argument that it is wrong for Norway to participate in military operations where a regional organisation, such as NATO, has neglected the Security Council's resolutions. As will be shown, this argument is based on somewhat different assumptions.

One argument that was put forward by one of the members representing the minority is that it is reassuring that the Security Council makes decisions about military interventions (Stortingsforhandlinger 06.12.94: 1533). This statement must be understood in light of the right of veto which all of the Security Council's five permanent members – China, the United States, Russia, the United Kingdom and France – enjoy. It implies that any of the permanent members can block a proposal, for example a proposal to allow NATO to intervene beyond its geographical boundaries. The system of veto, this minority member believes, 'provides a fairly efficient safety net, which ensures that unreasonable decisions that would affect individual countries are not passed' (Stortingsforhandlinger 06.12.94: 1533).

Another member representing the minority points to the UN Charter as a reason for why he considers it wrong that Norway should participate in military operations where NATO has ignored the Security Council: He claims that military operations that are not mandated by the Security Council are unlawful according to the UN Charter (Stortingsforhandlinger 06.12.94: 1550). His assumption is, in other words, that Norway has an obligation to respect the provisions in the UN Charter and that the country breaches this obligation by participating in the mentioned kinds of operations.

A third minority member acknowledges that it might be tempting to ignore the provisions concerning the Security Council's authority in the UN Charter in some situations. What this representative has in mind is probably a situation where the Security Council is paralysed because of antagonism between the veto powers. Nevertheless, this representative maintains that 'one exceeds a limit' by ignoring the provisions in the UN Charter (Stortingsforhandlinger 06.12.94: 1541). In his opinion it

would be better to adhere to the UN Charter's formal provisions; otherwise the consequences may be opposite of the ones desired (Stortingsforhandlinger 06.12.94: 1541). He does not amplify this point, but there is reason to believe that the undesirable consequences that he is worried about could come into existence in at least two different ways. First, they could result from a military operation getting out of control because of the lack of the Security Council's responsibility. Second, if NATO ignores the Security Council's decisions, the barrier for doing it again – or other actors doing it – diminishes. In the end, the Security Council's authority could be undermined.

In conclusion, the minority advances three reasons for their position: The Security Council's authority, the unlawfulness of non-UN-mandated military operations beyond NATO territory and the obligation to respect the UN Charter.<sup>16</sup>

The majority, on its part, did not speak of the potential unlawfulness of non-UN-mandated out-of-area operations.<sup>17</sup> Moreover, it proposed few arguments in favour of participation. One member representing the minority, however, arose to speak. He said that 'there is reason to emphasise that the use of Norwegian forces abroad must be understood as following up NATO's changed role in a new Europe. I would like to refer to the recent decisions taken at NATO's summit this year, according to which support of international peace operations are notoriously defined as one of the most important tasks in the time to come. Norway too should undertake its responsibilities and obligations in this respect' (Stortingsforhandlinger 06.12.94: 1536).

This representative thus argues that Norway should participate because international peace operations were defined as one of NATO's most important tasks at the Brussels summit 11 months earlier. There is reason to believe that this argument relies on the assumption that Norway is obligated towards NATO to participate in out-

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<sup>16</sup> These three reasons are interrelated and derive from the same argument: Norway's obligation to respect rules of international law. The UN Charter, which is an important source of international law, contains provisions about the authority of the Security Council.

<sup>17</sup> However, Defence Minister Jørgen Kosmo, who was present in the Storting and took part in the debate, was asked about the possible security political implications of neglecting the Security Council. He first claimed that such a situation is hypothetical (Stortingsforhandlinger 06.12.94: 1544). The next time he spoke, however, he acknowledged that a situation in which the Security Council is paralysed may arise and that Norway should not demure at participating without a UN mandate in such a case: '[The second scenario] is that the UN [...] actually is paralysed as an organisation due to political confrontations, and we should not make ourselves unable [...] of coming to our neighbours' assistance [...]' (Stortingsforhandlinger 06.12.94: 1544).

of-area operations. Since NATO has undertaken new roles after the end of the Cold War, one could assume that it is Norway's duty as a NATO member to contribute in order to make it possible for NATO to successfully fill these new roles. However, no arguments explaining what the obligation towards NATO consists in were raised during the debate.

The representative's reference to NATO's new role in a new Europe and Norway's responsibilities and obligations may also rely on an assumption that Norway, *through* NATO, has an obligation to promote peace beyond NATO's geographical boundaries. An argument raised by Defence Minister Jørgen Kosmo supports this interpretation: He pointed to 'ethnic and regional conflicts' on the European continent and argued that the international community is facing difficult tasks in this respect (Stortingsforhandling 06.12.94: 1543).<sup>18</sup> Therefore, Norway 'must take its part of the responsibility to maintain international peace and security' (Stortingsforhandling 06.12.94: 1543). Norway has an obligation towards the *international community* to promote peace and security, so to speak.

The Defence Minister also argued in favour of Norwegian participation in non-UN-mandated out-of-area operations because this would enhance Norway's own security: 'We cannot reckon that others will come to our rescue if we do not ourselves demonstrate our willingness to undertake responsibility [...]' (Stortingsforhandling 06.12.94: 1542). It is, in other words, in Norway's self-interest to participate in out-of-area operations for NATO. The argument proposed by the Defence Minister suggests that the Storting should vote in favour of participation because it has a duty to promote the national interest: The members of parliament can be seen as trustees who should always give priority to the interests of the population.

This account of the arguments and positions in the Storting suggests that the dissent resulted from diverging conceptions about Norway's obligations. The minority's reluctant stance towards participation in non-UN-mandated out-of-area operations seems to rely on the premise that Norway breaches its obligation to respect rules of international law by participating in such operations that the Security Council

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<sup>18</sup> Note that there was a full-scale war in Bosnia-Herzegovina in December 1994.

has not authorised. The reasons for the majority's vote in favour of participation were less explicit, but one representative referred to NATO's new roles and seem to have asserted that Norway is obligated towards NATO to participate. Moreover, the Defence Minister argued that the Storting should vote in favour because of the national interest and because of a duty towards the international community to promote peace and security.<sup>19</sup>

## 2.3 The Storting's ethical considerations

The main objective of this thesis is to determine whether Beslutning S. nr. 2, 06.12.94 is morally justifiable. As suggested in section 1.2, this must be determined upon consideration of the resolution's premises: The resolution is justified only if the premises upon which it rests are valid and if the content of the resolution logically follows from the premises.

When assessing whether a belief is justified, one must consider all arguments that are relevant to the belief (Engelstad et al. 1996: 299). If not, one risks basing one's beliefs on incomplete or imperfect premises. This is to say that when determining whether Beslutning S. nr. 2, 06.12.94 is justified, it is essential to have included all relevant considerations. This is what is understood as *comprehensiveness*. The previous section demonstrated that several considerations are relevant to Beslutning S. nr. 2, 06.12.94. This may suggest that I should take all considerations into account when investigating the resolution's justifiability. It is impossible, however, to consider all considerations within the confines of this thesis. I have therefore chosen to consider the arguments that the members were mostly concerned with.

The Storting's obligation towards the Norwegian population is a significant consideration because the population gives political leaders authority to act on its behalf through democratic elections. Hence, political leaders can be seen as trustees who have accepted a special responsibility to meet the needs, and promote the

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<sup>19</sup> I have presented the arguments as representative for either the entire majority or the entire minority, but we do not know for what reasons each representative voted either in favour of or against the resolution. However, we must assume that the members of parliament grounded their votes on those arguments that came up during the debate. Hence, we have reason to believe that those who voted against the resolution did it on the grounds of an assumed obligation to respect international law and that those who voted against did it on the grounds of assumed obligations towards NATO and the international community respectively as well as on the grounds of the national interest.

interests, of the population. When it comes to the obligation towards the international community to promote peace and security, there is little doubt that a devastating humanitarian situation calls for Norway's action.<sup>20</sup> In this case, however, the official report of the proceedings in the Storting shows that the representatives' attention was directed towards other considerations: The minority was clearly concerned about the unlawfulness of participation in non-UN-mandated out-of-area operations while the majority's preoccupation was less explicit. The members of parliament raised one argument in favour of participation: The one concerning NATO's new role and the decisions taken at the Brussels summit in January 1994. As suggested in the previous section, this argument seems to rely on an assumption that Norway is obligated towards NATO to participate in out-of-area operations. Since normative analyses should begin where practical deliberation begins to have an impact on political decision-making, I have chosen to explore the two considerations with which the members of the Storting seemed most preoccupied.

## 2.4 A proposed method for normative analysis

The two considerations with which the members of parliament seemed most preoccupied are the obligation to adhere to rules of international law and the obligation towards NATO to participate in non-UN-mandated out-of-area operations. Hence, when passing Beslutning S. nr. 2, 06.12.94, the majority must have assumed that

- (i) Beslutning S. nr. 2, 06.12.94 does not represent a violation of the rules concerning the resort to military force in international law, or
- (ii) Beslutning S. nr. 2, 06.12.94 represents a violation of the rules concerning the resort to military force in international law, but there were adequate reasons for giving priority to the obligation towards

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<sup>20</sup> This moral consideration has enjoyed extensive attention in academic literature. However, existing literature demonstrates, for one thing, diverging conclusions as to how this moral obligation is to be met and there is no unanimous prescriptions as to the use of military force. Hence, the normative standpoint that Norway should participate in non-UN-mandated out-of-area operations does not necessarily follow from the premise that Norway has an obligation to promote international peace and security.



NATO to participate in non-UN-mandated out-of-area operations to the detriment of the obligation to adhere to rules of international law.

If Beslutning S. nr. 2, 06.12.94, is justified, it must rest on one of the two premises. In order to determine whether these premises are valid, the first thing I have to do is to determine whether Beslutning S. nr. 2, 06.12.94 actually complies with the rules concerning the resort to military force in international law. I will propose a method for assessing the content of rules of international law in chapter 3. If this premise turns out to be invalid, I must investigate the other premise: Whether there were adequate reasons for having given priority to the obligation towards NATO. In order to determine this, I have to know whether such an obligation exists in the first place. In practical terms, this means that I should explore whether Norway is obligated towards NATO to participate in out-of-area operations that the Security Council has not mandated. How should the validity of this normative premise be assessed?

#### 2.4.1 Testing the validity of normative statements

In assessing whether a normative statement is justified, the crucial task consists in determining whether there is reason to accept the statement. A normative statement will be justified if anyone has reason to adopt the belief. I will therefore present a method for normative analysis dealing with justification and explanation for the purpose of determining how one may proceed in order to establish whether normative premises or statements – such as the one that Norway is obligated towards NATO to participate in out-of-area operations – are justified or not. I will first say something about moral intuitions, as they seem to play a role in normative reasoning.

##### *Moral intuitions*

One suggested method for testing the validity of moral ideas is to make appeal to *moral intuitions*. If one appeals to moral intuitions in testing the validity of a normative statement, the statement will be valid if it is intuitively appealing. Hence, the normative statement that Norway is obligated to participate in non-UN-mandated

out-of-area operations will be valid if it is intuitively appealing. There are, however, different understandings of what moral intuitions are.

Most often, intuition is understood as a *conviction* so strong that one cannot think of anything that could make one renounce it (Engelstad et al. 1996: 291). A moral intuition is the result of more or less careful reasoning. Moral beliefs derive from considering the issue at hand. In testing the normative principle that Norway is obligated towards NATO to participate in out-of-area operations, we must make appeal to those *considered judgments* that we have already formed. The assumption is that we cannot trust judgments that are formed on impulse.

However, to trust moral intuitions – even though they are *considered judgments* – can be hazardous. Judgments that are formed upon careful reasoning can be volatile and prejudiced: Since the state of mind changes, our intuitions about right and wrong cannot be consistent. It was noted above that the task of justifying moral statements consists in providing arguments or reasons that makes one accept the statement. To appeal to our intuitions – understood as considered judgments – cannot fully meet the methodological requirement of explanation: To make our considered judgments the test of validity is not to provide arguments *why* a certain standpoint is acceptable or not. This is not to say that intuitions do not play a role at all in normative reasoning, and I will return to this issue below. My point is simply that normative statements that are tested on the basis of our intuitions should be considered *ad hoc* responses to moral questions until a more careful test is carried through.

The intuitionist method is increasingly supplemented with two other and more reliable ways of testing the validity of moral ideas. These tests deal with explanation and justification.

### *Philosophical explanations*

The validity of a normative principle can be tested by investigating whether it is supported by a more general principle: More general principles are invoked as philosophical explanations for why a normative standpoint is correct or incorrect. If one does not accept the explanations that are stated in defence of the statement, the normative standpoint has proven invalid. Contrarily, the normative standpoint gains

support if we accept the more general principle. One could attempt to justify the normative statement that Norway should participate in non-UN-mandated out-of-area operations by referring to a more general principle, saying that members of a scheme of co-operation have a duty to contribute in achieving the goals of the scheme.

It is sometimes claimed that efforts at justifying moral beliefs through philosophical explanation cannot actually resolve moral disagreement. By making reference to more general principles, one takes moral disagreement to a higher level of abstraction (Malnes 1992: 124). To appeal to philosophical explanations for the premises upon which the parliamentary resolution rests, for example, will reveal diverging basic moral outlooks. In any case, it can be valuable to extract more general principles from specific moral beliefs. Making general principles explicit will enable us to understand why people actually disagree, and it contributes to greater transparency in normative thinking (Malnes 1992: 125).

### *Reflective equilibrium*

Another method for assessing the validity of a normative principle consists in investigating possible implications in order to see whether they correspond to our considered judgments<sup>21</sup> about right solutions (Engelstad et al. 1996: 292–296; Semb 2000a: 19). This procedure has much in common with empirical hypothesis testing: One deduces specific implications of a given principle that one eventually subjects to test. If one accepts the deduced implications, it strengthens the validity of the normative principle. The more implications of a principle deduced and tested, the better it is. Hence, considered judgments have a place in the process of verification, but not independently of moral principles.

What happens if the deduced principles are not accepted? There are, as Semb (2000a: 19) demonstrates, several solutions: One solution is to conclude that the principle is undermined. But since the test has only shown that the specific implications that are deduced are unacceptable, one cannot reject the principle

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<sup>21</sup> According to Rawls (1972: 49), considered judgments are ‘those judgments in which our moral capacities are most likely to be displayed without distortion’. Engelstad et al.’s definition of considered judgment, as noted above, is conviction that is so strong that one cannot think of anything that could make one renounce it (1996: 291).

altogether. Thus the conclusion must be that the principle's credibility is weakened. Another solution consists in saying that the considered judgment must yield. Yet a third solution is one proposed by John Rawls. He suggests that normative analysis should consist in achieving a so-called reflective equilibrium between normative principles and considered judgments (Rawls 1972: 20, 48–49): One should both test normative principles against judgments about particular cases and judgments about particular cases against normative principles. For example, to assess the validity of the statement that Norway should participate in non-UN-mandated out-of-area operations, one should hold it to relevant normative principles. One should also hold the normative principles to considered judgments. Rawls' suggestion is that in cases where the normative principle runs counter to our judgments, we should 'go back and forth, sometimes altering the [principles], at others [withdraw] our judgments and conforming them to [the] principle' (1972: 20). This operation should be performed until there is consistency between the normative principle and the considered judgment: '[A]t last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform [...]' (1972: 20). Hence, both normative principles and judgments about particular cases play a crucial role in normative reasoning. Today, this is an acknowledged and widespread method for testing the validity of normative statements.

Norman Daniels (1979) elaborates the complexity in Rawls' method and argues that even though consistency between a normative principles and considered judgments<sup>22</sup> exists does not imply that the normative principle is justified. Daniels maintains that considered judgments are insufficient in assessing the validity of a principle: Moral justification consists in seeking a point of equilibrium that involves a set of considered moral judgments, normative principles *and* a set of relevant background theories (1979: 258–260). Thus a principle is justified only if a certain background theory gives *independent* support to the proposed principle (Daniels 1979: 259). The background theory must show that the normative principle is more

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<sup>22</sup> This is according to Daniels (1979: 258) *narrow* reflective equilibrium.

acceptable than an alternative principle. In that case, one has reached a ‘wide reflective equilibrium’.

#### 2.4.2 Testing the validity of the Storting’s premises

I have now presented two ways of testing the validity of moral statements that appear more reliable than making appeal to moral intuitions. When I test the validity of the normative premises upon which Beslutning S. nr. 2, 06.12.94 rests, I will primarily rely on the methods proposed by Rawls (1972) and Daniels (1979). My aim with following this procedure is to separate prejudiced and personal beliefs from justified beliefs.

In determining whether the premise that Norway is obligated to participate in non-UN-mandated operations is valid, I am going to propose normative principles to investigate whether the premise comply with normative principles in this section. As noted above, however, to establish consistency between the premise and a normative principle will not be sufficient to conclude that the premise is justified. Even if the normative principle seems to comply with the premise, therefore, it is necessary to advance philosophical arguments. This will be done in subsequent chapters. In attempts at determining whether the normative principle is independently supported by such philosophical arguments, I will invoke ethical theories.

It was explained in section 2.2 that the Storting’s majority did not point out why it considers Norway obligated towards NATO to participate in non-UN-mandated out-of-area operations. Three possible sources of obligation, or normative principles, can be suggested, however. The first possible source of obligation is a *contractual obligation*. The North Atlantic Treaty established NATO as an organisation and Norway ratified this treaty on 8 July 1949 (Law Department of the Ministry of Foreign Affairs 2002). As noted in the introduction, the mutual defence commitment embedded in Article 5 constitutes the Treaty’s cornerstone. Article 3 establishes that every member state is obligated to ‘separately and jointly, by means of continuous and effective self-help and mutual aid maintain and develop their individual and collective capacity to resist armed attack’. Does the North Atlantic Treaty establish that Norway is required to participate in out-of-area operations?

According to the terms of Article 3, Norway has consented<sup>23</sup> to develop its own and the other members' capacity to *resist armed attack*. This commitment must be understood in light of NATO's main preoccupation when the North Atlantic Treaty was adopted: The *defence of NATO territory* against the threat of Soviet aggression or coercion. Throughout the Cold War, NATO operations beyond its territory was unthinkable (Yost 1998: 189). Moreover, Article 6 of the North Atlantic Treaty, which describes the geographical limits of Article 5, was generally interpreted restrictively to exclude military operations out of area (Yost 1998: 189). For these reasons, we can reasonable conclude that the North Atlantic Treaty does not require Norway to participate in out-of-area operations. Hence, the first proposed normative principle did not fit with the premise that Norway must participate in out-of-area operations.

The North Atlantic Treaty does not necessarily give a full account of Norway's obligations towards NATO, however. As explained in section 1.2.3, NATO is no longer an alliance based exclusively on collective defence. Political declarations, investments, exercises and military operations after the Cold War demonstrate that the alliance also has *collective security* aspirations. Collective security and the activities associated with the concept were not envisaged when the North Atlantic Treaty was adopted. These would require an expansion of obligations beyond the mutual defence pledge expressed in Article 5. What arguments suggest that NATO members could be obligated to enhance collective security?

The Storting's Defence Committee proposes another normative principle. In the recommendation to the Storting, it alludes to the *fair distribution of burdens* as a source of moral obligation:

[T]he debate concerning the distribution of burdens within NATO [...] gives reason to stress that one must consider ordering Norwegian forces to NATO operations to a greater extent than earlier. (Innst. S. nr. 23 (1994–95): 2)

The Defence Committee does not explicitly say that Norway should participate in *non-UN-mandated* out-of-area operations because it constitutes Norway's fair share. However, a majority of the Defence Committee's members proposed to the Storting that Norway should participate in out-of-area operations even if the Security Council

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<sup>23</sup> I will thoroughly treat the issue of consent and international treaties a source of obligation in sections 3.2 and 5.2.1.

has not given a formal authorisation to such operations. This suggests that we may reasonably assume that this majority asserted that participation in non-UN-mandated operations constitutes part of Norway's fair share of the burden as a NATO member. The principle of fair distribution of burdens seems to give support to the premise that Norway should participate in non-UN-mandated out-of-area operations, but it will have to be investigated in more detail. To determine whether the premise is justified, I will invoke the notion of equality to assess whether the principle of fair distribution of burdens actually gives independent support to the proposed principle. I will do this in chapter 4.

A third normative principle suggests that Norway should participate in non-UN-mandated out-of-area: *The principle of reciprocity*. This principle requires beneficiaries to make returns for received benefits. In the present case, the principle suggests that Norway's membership in NATO has yielded benefits that generate an obligation to participate in non-UN-mandated out-of-area operations because Norway *owes* NATO this kind of contribution. If a reciprocal obligation imposes a duty on Norway towards NATO, it must be because its membership has yielded benefits *beyond* those benefits that the North Atlantic Treaty establishes. The reason is that the North Atlantic Treaty itself established that the members are obligated to contribute in enhancing the goals that the Treaty sets out. To determine whether this principle gives independent support to the premise that Norway is obligated towards NATO to participate in out-of-area operations, I will explore thoroughly explore the notion of reciprocity as it has been expounded in philosophy and sociology in chapter 5.

There are three possible conclusions to the question of whether the premises on which Beslutning S. nr. 2, 06.12.94 rests are valid:

- (i) The resolution is justified. Both premises of Beslutning S. nr. 2, 06.12.94 – that the resolution meets an obligation to participate in non-UN-mandated out-of-area operations and does not represent a violation of the rules concerning the resort to military force in international law – are valid.

- (ii) The resolution is unjustified. Neither premises of Beslutning S. nr. 2, 06.12.94 are valid.
- (iii) There is a situation of a moral dilemma. The premise that the resolution meets an obligation to participate in non-UN-mandated out-of-area operations is valid, while the premise that it does not represent a violation of the rules concerning the resort to military force in international law is invalid.

If (iii) turns out to be the case, I will have to subject the considerations to scrutiny again in order to determine whether there were adequate reasons for having solved the moral dilemma in favour of the obligation towards NATO to the detriment of the obligation to adhere to rules of international law.



### 3 INTERNATIONAL LAW AND THE RESORT TO MILITARY FORCE

The main purpose of this chapter is to assess whether Beslutning S. nr. 2, 06.12.94 complies with the rules concerning the resort to military force in international law or not. The crucial question is whether international law allows or prohibits an alliance of states, such as NATO, to resort to military force outside of its geographical boundaries if the Security Council has not authorised such action. International law is an international norms system that consists of numerous rules. The modern international law system began to take shape in the 17<sup>th</sup> Century, but some rules of international law have roots in the early Middle Ages. Most contemporary rules of international law, however, have come to existence after 1945.

International law makes a fundamental distinction between offensive and defensive action. In assessing the lawfulness of Beslutning S. nr.2, 06.12.94, one should know whether to characterise the military operations that the Storting consented to as offensive or defensive in nature. In section 1.2.4 it was noted that Beslutning S. nr. 2, 06.12.94 seems to approve of Norwegian participation in NATO operations that are conducted for one of the two following purposes:

- (i) Humanitarian: To prevent or stop human rights violations or to secure fundamental needs in the case of a humanitarian crisis in countries that are not members of NATO.
- (ii) Defensive: To meet the security threat that instability in NATO's geographical rim represents to the alliance.

The purpose of military operations of the first kind is to *protect* individuals from human rights violations or to help off human suffering. As the defence of an innocent third party is what is at stake, one can be easily be led to think that these kinds of military operations imply *defensive* action. International law is state-centred, however. When defence of an innocent third party presupposes intervention in the internal

affairs of a state, it is considered an aggressive action.<sup>24</sup> This explains why military actions for humanitarian purposes often are referred to as humanitarian *interventions*, a concept that I return to in section 3.6. For this reason, one must assess the lawfulness of military operations for humanitarian purposes by invoking rules concerning offensive action.

NATO's redefinition of security after the end of the Cold War challenges the strict distinction between offensive and defensive action in international law. As noted in section 1.2.3, NATO perceives instability in its geographical rim as a threat and is prepared to carry through military operations to encounter this threat. Thus, one should not preclude the possibility that NATO could be the first to transgress an international border. This would imply that one should evaluate this kind of military operations in light of the rules concerning offensive action. In NATO's perspective, to understand possible military operations of this kind as offensive in nature is to miss the point. Rather, they should be understood as a new approach in enhancing security, and thus of defensive nature.<sup>25</sup> I will take NATO at its word and evaluate such military operations in light of the right to self-defence in international law.

Beslutning S. nr. 2, 06.12.94 establishes that the military operations that Norway will participate in must be 'in accordance with the principles of the United Nations Charter together with the principles of the Helsinki Final Act and the intentions of the Paris Declaration'. While the Storting considers both the Helsinki Final Act and the Paris Declaration relevant to the conduct of out-of-area operations, I will not. The Helsinki Final Act, which was adopted in 1975 and established the CSCE, is a regional arrangement. So is the Paris Declaration, which was adopted by the CSCE in 1990. For reasons that I return to in section 3.4, this implies that these documents do not enjoy the same status as the UN Charter as sources of international law.

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<sup>24</sup> Note that the UN Charter lacks an explicit principle of non-intervention. However, the UN General Assembly has adopted two resolutions that reaffirm the principle of non-intervention (Semb 2000b: 471).

<sup>25</sup> The military operation in Afghanistan is conducted with reference to rules of self-defence. The Norwegian Defence Minister Kristin Krohn Devold has explicitly stated this several times, the last time on 12 October 2002: 'The terror plot against the United States exceeded high jacking and terror bombing. The plot amounted to an armed attack which implies that the rules of self-defence in international law come to effect' (Devold 2002).

International law is a dynamic norms system; it is continually developing. This suggests that I must identify the rules concerning the resort to military force in the year 1994, when Beslutning S. nr. 2, 06.12.94 was passed. International legal standards are rarely crystal clear, however. In sections 3.1 and 3.2 I will point to some reasons that throw light on the apparently impalpable nature of international law. In section 3.3 I will suggest a method for how one nevertheless may proceed to assess the content of rules of international law. In section 3.4 and 3.5 I will account for the rules concerning the resort to military force and in section 3.6 I will assess whether Beslutning S. nr. 2, 06.12.94 complies with these rules or not.

### 3.1 Legal standards and moral principles

As pointed out above, the purpose of the present chapter is to determine whether Beslutning S. nr. 2, 06.12.94 is unlawful according to the rules concerning the resort to military force in international law. However, there is a tendency to equal what is lawful with what is morally permissible (or obligatory) in international relations. During NATO's military intervention in Kosovo in 1999, *legal* rules and *moral* principles were used interchangeably to justify the intervention. The Norwegian government justified the bombing by referring to legislation. At least on one occasion, Foreign Minister Vollebæk referred to the UN Charter to justify NATO's bombing (Vollebæk 1999). The US government, contrarily, invoked moral principles. President Clinton argued that passivity towards the Albanian civilian population would be immoral. To him, NATO action was 'a moral imperative' (Clinton 1999). The academic debate that arose in the wake of the bombing in Kosovo reflects different methodological traditions. Some scholars follow a legalist approach, while others invoke ethical concepts.<sup>26</sup> The recourse to both legal standards and moral principles points towards the existence of a normative double standard in international relations: An obligation to adhere to rules of international law and an obligation to adhere to

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<sup>26</sup> Simma (1999) and Helgesen (1999) adhere to a legalist approach. Reichberg (2001), on the other hand, argues that it is important to move beyond a purely legalist approach. Fixdal & Smith (1998) have earlier shown that most discussion on humanitarian intervention is devoid of ethical concepts and suggested the resort to ethical concepts in the Just War tradition.

moral principles. Is it unimportant whether one invokes one normative framework rather than the other?

Many – probably most – contemporary rules of international law reflect moral principles. Provisions concerning human rights, refugees and asylum, for example, are strongly influenced by such principles. So are the rules concerning the resort to military force. It is important to note, however, that not all moral principles are, or should be, translated into legal injunctions. In order for legislation to be effective when it comes to directing the behaviour of both people and states, different pragmatic considerations suggest that not every part of morality has a counterpart in law (see Malnes 1994: 74–78).<sup>27</sup> This implies that a state's legal obligations under international law are not necessarily equivalent to its moral obligations. Hence, an action can be unlawful, but morally irreproachable or even praiseworthy. To assess the *lawfulness* of an action, therefore, one must clearly invoke legislation.

The notion of necessity occurs in both national and international legislation. According to this notion, an action that in the ordinary run of things is unlawful can nevertheless be lawful (Helgesen 1999: 19). This notion is meant to apply only in very special circumstances: in the case of uttermost *necessity*. The 1980 Drafts Articles on State Responsibility by the International Law Commissions, which is considered the most thorough and authoritative one on the notion of necessity, concludes that the notion of necessity is a relevant source of international law (Helgesen 1999: 20). Is the notion of necessity relevant for assessing the lawfulness of Beslutning S. nr. 2, 06.12.94?

As noted in the introduction, the purpose of the Storting's vote was to lay down guidelines for the use of Norwegian forces abroad. There are no indications that Beslutning S. nr. 2, 06.12.94 was passed because of necessity. This implies that I do not have to consider it. Moreover, it seems to me that to invoke this notion in cases when a state or several states has carried through actions that in the ordinary run of things are unlawful, comes close to a moral justification for the unlawful action. How

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<sup>27</sup> One such pragmatic consideration is the slippery slope argument. There are different versions of this argument, but a general structure of it is as follows: (1) If X is permitted, Y will be hard to avoid; (2) Y is morally unacceptable or otherwise undesirable; therefore (3) X must not be permitted (Malnes 1994: 77).

can one say that the law *itself* constitute the basis for considering the act permissible? When the letter of the law is overridden by very special circumstances, it seems that a justification *beyond* the law itself is invoked. For these reasons, I will rule out the notion of necessity in the following account. I will evaluate Beslutning S. nr. 2, 06.12.94 in light of the legal framework that international law provides.

### 3.2 International law and the feature of the international system

It was mentioned in the previous section that rules of international law are rarely crystal clear. In this section, I am going to account for some basic features of the international system that shed light on the difficulties related to assessing the rules of international law. An important reason why it is difficult to establish the precise content of a rule is that some issues, as the resort to military force, are grounded in different sources. Sometimes, the sources express different standards.

This is not only the case for international rules, however: National rules are also grounded in various sources. At the national level, however, interpretation and application of legislation takes place according to established procedures within a hierarchical system of courts. The feature of the international system, however, causes special problems of interpretation. At the international level, the task of interpretation is shared by institutions of a rather different nature: By national courts, international organisations, such as the United Nations, and international institutions, such as the International Court of Justice and the European Court for Human Rights. However, most international law theory gives the International Court of Justice a prominent status when it comes to interpretation.

The task of the International Court of Justice is to settle those legal disputes that states submit to it. Its scope is, nevertheless, limited: It depends on the states' own decisions whether an international dispute is to be taken to the International Court of Justice or not. Therefore, the Court only considers a limited number of issues. Both the International Court of Justice, the ad-hoc tribunals for war crimes in the former

Yugoslavia and in Rwanda and the International Permanent Criminal Court<sup>28</sup> are indications of a judiciary power at the international level. However, the international community lacks a sovereign executive power to compel the Court's decisions. The international system also lacks a sovereign legislative power. The lack of a legislative, an executive, and a sovereign judiciary power in the international system is one reason why it is often characterised as a system of sovereign states. For present purposes, what is important is the following question: How does international law emerge in this 'system of sovereign states'?

According to one position – of which John Austin is one important proponent (Malnes 1994: 72; Stumpf 1966: 95) – law can only emerge from sovereign power. Since there is no sovereign legislative body at the international level, this is to say that there is no such thing as international law. However, the fact that states themselves often refer to international law in initiating foreign policy acts certainly implies that international law exists. So is the mere existence of the International Court of Justice – and its judgements.

According to the *theory of consent*, however, international law comes into existence independently of a sovereign legislative power: It is the product of the consent of states. To consent is to *explicitly* undertake an obligation.<sup>29</sup> International law emerges because states consent to behave in particular manners through agreements with other states. This means that states – when giving their consent – both *create* law and bind themselves to its provisions. Although consent theory does seem to come up with a reliable explanation for how international law emerges, it is not immune to critique. The criticism levelled against this theory is that it suffers from two shortcomings, a critique that I am going to treat in some detail. I will draw on Stumpf's (1966: 170–171) criticism in the following.

Firstly, it is maintained that consent cannot be an obligation-generating act. The reason for this is that the international system is a system of *sovereign* states. As the notion that one becomes bound by consenting is itself not the product of anybody's

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<sup>28</sup> The Rome statute on the International Permanent Criminal Court, adopted in 1998, entered into force on 1 July 2002 (Rome Statute of the International Permanent Criminal Court). It is expected that the court will be operational in the first half of 2003 (Amnesty International).

<sup>29</sup> This issue is treated in more detail in section 5.2.1.

consent, agreements to behave in a special manner cannot actually *bind* states. Hence, self-imposed limitations cannot be true limitations. Is the critique justified?

When states consent to or approve of international treaties, they declare towards other states that they actually will adhere to treaty provisions. When states consent to rules of international law, therefore, they promise towards other states to behave in a particular manner. Hence, to maintain that states are not bound by consent is to say that they enjoy a right to break their promises. This implies that critics of consent theory adhere to a special understanding of the concept sovereignty. It is invoked as a normative argument saying that the *moral* principle that promises should be kept does not apply to states. Since I have already argued that morality is indeed relevant to the political sphere, I shall not dwell with the issue of whether states become obligated by consenting to rules of international law. I shall assume that they do. It is a matter of fact that states themselves perceive consent as an obligation-generating act: Although they do not always adhere to the rules that they have consented to, they do from time to time explicitly declare that international law is binding. Furthermore, generations of international lawyers have viewed consent as the pre-eminent feature of international law and relations (Charney & Danilenko 1995: 23).

A second criticism levelled against consent theory is that it does not give a satisfactory explanation for why new states are bound by international law. It is a widespread notion – not least among states themselves – that when new states are formed, they are required to adhere to existing international law provisions. As new states cannot possibly have given their consent, however, consent theory only partly explains why states must adhere to rules of international law. Moreover, consent theory does not explain why states are obligated to adhere to customary international law, which is not created upon the explicit undertaking of an obligation.<sup>30</sup>

The principle of reciprocity and the principle of fair play are two other possible sources of obligation. These principles suggest that when states benefit from other states adhering to international law, they are required to make returns for the benefits by adhering to the same rules. I will thoroughly account for the mentioned principles

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<sup>30</sup> I will account for customary international law in section 3.3.2.

in chapter 5. Thus, a full account of what it is that actually obligates states to respect rules of international law will therefore have to remain somewhat unresolved throughout this chapter.

I will now turn to the question of how one should proceed to identify the content of rules of international law. I will start by accounting for the different sources of international law.

### 3.3 Sources of international law

Article 38 in the Statute of the International Court of Justice contains important principles. It defines the relevant sources of international law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

This article partly supports the view that international law is a product of state consent as international conventions (or treaties) are created when states explicitly declare that they consider themselves bound by it. International custom, however, emerges not from explicit declarations, but from other forms of state behaviour. A thorough account of these two important sources follows in the next two paragraphs. First, however, I will briefly account for the two other sources of international law that the Statute recognises (letters c and d): General principles of law, judicial decisions and juridical literature. These sources do not derive from state behaviour.

In the previous section I mentioned several institutions that pass judicial decisions. It was noted that the International Court of Justice enjoys a prominent status among these institutions. Accordingly, there seems to be reason to pay more attention to the judgements passed by this institution than to the other institutions' judgements. The wording of Article 38 of the Statute of the International Court of Justice confers judicial decisions and juridical literature subsidiary status as sources, while treaties and custom are given primary importance. In spite of that, juridical literature will have a



prominent place in my account because this source is more easily accessible than the other sources. The literature that I refer to, however, use conventions and custom as its primary sources, in conformity with Article 38 in the Statute.<sup>31</sup>

Letter c in Article 38 mentions general principles of law as a source of international law. There exist several possible interpretations of this source of international law. There are, however, serious objections to all of these interpretations. The International Court of Justice has never fully examined the general principles of law as a source. Neither has it expressly found that a particular norm has been derived from general principles (Charney & Danilenko 1995: 45). Anthony Arend (2000: 49–53), however, argues that this source of international law has been underestimated in international law theory. He suggests that general principles of law are essential for the very existence of international law: He sees the general principles of law as principles about the nature of international law. They are ‘philosophically prior to custom and treaties’ (Arend 2000: 52). One general principle of law, he argues, is that international law is created by states: ‘For all the other sources to make sense, it must first be accepted that states are the constitutive agents’ (Arend 2000: 52).

A reasonable interpretation of Arend’s assertions is that he uses the general principles of law to make up for the difficulties with explaining why states actually are obligated to respect rules of international law. It seems, however, that Arend gives the general principles of law too much significance. As noted above, the Statute of the International Court of Justice reckons general principles of law as one of several *sources* of rules of international law. Since there is no unanimous interpretation of this source of international law, I will not consider it when I later ascertain the rules concerning the resort to military force.

### 3.3.1 International treaties

An international treaty (or a convention) is a written agreement between at least two states or other subjects of international law. A treaty is most often the product of a

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<sup>31</sup> As will be demonstrated in section 3.4, contemporary international law theory diverges on the confidence it places in conventions and custom and for this reason there is a tendency to weight the two sources differently. I shall be explicit about my own position.

long negotiation process. Treaties become rules of international law when a sufficiently number of states – usually specified by the treaty itself – explicitly has approved of the treaty. An explicit approval can take many forms: as signature, acceptance, accession or ratification (The Vienna Convention on the Law of Treaties, Article 11). When approving of a treaty, states become bound by the convention's provisions. An important question in international law theory is whether a non-contracting state can become bound by an international convention.

Generally, the answer is no. Article 34 of the Vienna Convention on the Law of Treaties establishes that 'a treaty does not create either obligations or rights for a third party without its consent'. This is in accordance with the previous account of consent theory. The International Court of Justice has also stressed that treaties cannot bind a state without its consent (Charney & Danilenko 1995: 38). The underlying assumption of this position is that states are free until they voluntarily agree to be bound by treaties.

Nevertheless, it is sometimes asserted that treaties can bind third states in special cases and that the UN Charter is a treaty of this kind. One argument set forth is that the Charter has acquired status as international *custom* and that consequently, all states are bound by the custom. Another argument the rules in the Charter have become *peremptory norms* (Charney & Danilenko 1995: 40). Since Norway has ratified the Charter and thus bound by it, I will not dwell with this issue in more detail.

### 3.3.2 International custom

While there is generally little doubt whether an international treaty exists, the case is somewhat different when it comes to international custom. International custom is a source of international law that is not expressed in written form. International custom – and treaties also – exist both at the regional and at the international level. How does one determine whether an international custom has emerged? Article 38 in the Statute of the International Court of Justice does not suggest how international custom comes into existence. It simply notes that international custom is 'an evidence of a general practice accepted as law' (Article 38). In international law theory, this point is

amplified as two criteria (Charney & Danilenko 1995: 34). For an international custom to exist,

- (i) there must be a general practice, and
- (ii) the states must perceive the general practice to be law (*opinio juris*).

The first criterion implies that states do not have to declare themselves bound by a legal standard as long as their behaviour actually comply with the standard. The second criterion implies that states must adhere to a practice because they presume that a legal obligation require that they behave in that specific manner. Hence, a policy pursued for the sake of the national interest of states will not give rise to customary international law. If a state wants to create a new rule or modify the content of an already existing rule, it should invite a negotiation process for the purpose of adopting a new treaty.

A crucial question is how common state behaviour must be to qualify as an international custom. It is generally assumed that a custom emerges if a majority of the states in the international community adhere to a practice. A qualifying majority should be decided upon consideration of a specific case. It is also assumed that states that do not adhere to practice also become bound to the custom. This follows from the assumption that silence gives consent. However, states may protest against a practice. What are the implications if a state refuses to acknowledge a custom? A dissent at the regional level may be fatal to the establishment of a norm. At the international level, however, it is not likely that one or a few dissenting states can prevent an overwhelming majority's practice from becoming a rule of international law, and thus binding also upon the protesting states themselves (Charney & Danilenko 1995: 34).

### 3.4 Assessing the content of rules of international law

It was noted above that the Statute of the International Court of Justice establishes treaties and international custom as primary sources of international law. However, the relationship between the two sources is complex: On the one hand, a treaty can replace an international custom. During the 20<sup>th</sup> century, international custom with uncertain

legal status has been codified in the form of written agreements. On the other hand, international custom may replace a treaty. State behaviour that differs from convention-based rules can give rise to new legal considerations. When one wants to ascertain the content of an international legal rule, therefore, one must seek for evidence in state behaviour. Have states consented to a legal rule by approving of an international treaty? Does a certain practice qualify as international custom?

Scholarly writings, however, offer different methodological traditions for determining the content of a rule of international law. Although the traditions recognise both treaties and custom as sources, they diverge with regard to the interpretation of state behaviour and the weighting of sources. One tradition – by its critics called legal positivism (Arend 1999: 70) – considers international treaties as primary sources as they express state consent. In this perspective, substantial evidence – a widespread practice and *opinio juris* – is required to say that an international custom with a different legal standard than the one expressed in a treaty has emerged. This is the traditional and the predominant view.

Another approach, of which Anthony Arend and Robert Beck (Arend & Beck 1993; Arend 1999) are important proponents, sees greater difficulties with using treaties as sources. Arend & Beck (1993: 9–10) set up what they call an authority-control test in order to determine the content of a rule of international law. To determine whether a putative norm is genuinely law, one must establish whether it is ‘authoritative’ and ‘controlling’. *Any* norm of international law – either expressed in a text or established through custom – must be both authoritative and controlling. I shall devote some space to an account and discussion of the authority-control test.

According to Arend & Beck (1999: 9), a rule is controlling if it is reflected in the actual practice of states. 100 percent compliance is not necessary. This is in accordance with the previous account of what it takes for treaties and custom to be binding on states. The case is different when it comes to the other criterion. Arend & Beck (1999: 9) defines a norm as authoritative if states, in general, ‘regard the norm as legitimate; they must perceive it to be “law”’. In the traditional language of international law, the norm must have *opinio juris*’ (Arend & Beck 1993: 9). According to Arend & Beck, this criterion applies for treaties as well as for customary

international law. It is worth considering the implications of the authority criterion for treaties.

As states must perceive *treaties* as law for it to be genuinely law, the criterion implies that it is not enough that states actually have approved of a treaty. Although Arend & Beck's comments on what it actually takes for states to 'regard a norm as legitimate' are rather sparse, the few remarks gives one reason to believe that they assert that states must *adhere* to a treaty to perceive it as law: If states do not actually comply with a treaty that they have approved of, it is no longer *controlling* of their behaviour, which is the basic criterion. The underlying assumption of this view must be that if states do not adhere to an established treaty, this is evidence that they have withdrawn their consent. This understanding of what it means that states 'regard' a norm as legitimate implies that if a considerable number of states breach a treaty's provisions, for the sake of their own national interest for instance, it should no longer be regarded as valid law.

In section 3.3.2 it was noted that it takes more to say that a treaty no longer represents valid law: Only a new custom – a widespread practice among states *and* *opinio juris* – can nullify a treaty. This is the predominant view. In making these basic assertions, this approach proposes a normative barrier against policies that are pursued for the sake of the national interest. It precludes any foreign policy from becoming normative unless it is carried out based on a *belief* that it is legally required. Hence, it guarantees that states simply can ignore their promises by pursuing a new practice.<sup>32</sup>

In the following account, I will adhere to the method for assessing the content of international law that the traditional and predominant method offers. While Arend & Beck's (1999) account implies that states easily can form new practices, the basic assertions embedded in the traditional approach are in accordance with the basic assumptions about the feature of the international system and state sovereignty set forth in section 3.2: That states, although existing in a system that lack sovereign legislative and executive power, are morally required to keep their promises.

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<sup>32</sup> As noted above, this does not imply that it is impossible to achieve a legitimate breakthrough for new practices: Any state can initiate a negotiating process for the purpose of adopting a new treaty expressing a different legal standard.

### 3.5 Beslutning S. nr. 2, 06.12.94 and the United Nations Charter

The purpose of this section is to determine whether Beslutning S. nr. 2, 06.12.94 complies with the rules concerning the resort to military force in the UN Charter. I will first account for the rules in the Charter (section 3.5.1) and then evaluate Beslutning S. nr. 2, 06.12.94 in light of the rules.

#### 3.5.1 The rules concerning the resort to military force in the United Nations Charter

The United Nations Charter was adopted at the San Francisco Conference on 26 June 1945. The United Nations came into official existence on 24 October 1945 when China, the Soviet Union, the United States, the United Kingdom, France and a majority of the other signatories had ratified the Charter. Norway ratified the UN Charter on 27 November 1945 (Law Department of the Ministry of Foreign Affairs 2002). Today, the UN consists of 191 member states (United Nations Home Page).

The primary rule about the resort to military force – Article 2 (4) – is a general prohibition on the resort to military force:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This article forbids offensive war and states that *threat* of use of force is illegal.

An overwhelming majority of international law experts consider Article 2 (4) to be part of *jus cogens*. This means that it is accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted (Simma 1999: 3). Accordingly, any agreement or decision that contradicts Article 2 (4) is unlawful. For example, a regional agreement that runs contrary to the article will be unlawful. Rules that enjoy the status of *jus cogens* can be modified only by a subsequent norm of general international law having the same peremptory character (Simma 1999: 3).

The UN Charter contains two exceptions to the general prohibition of the resort to military force. According to Article 51, the member states are entitled to protect themselves individually or collectively in the case of an ‘armed attack’ directed from another state. This right to self-defence only applies ‘until the Security Council has taken measures necessary to maintain international peace and security’ (Article 51).

This means that until the Security Council has established that there is a breach of the peace and has taken the necessary measures, an attacked state enjoy a right to self-defence.

There is also another exception to Article 2 (4). Article 24 gives the Security Council a superior responsibility for maintaining international peace and security. Chapter 7 in the UN Charter contains several articles that describe the way in which the Security Council may exercise this responsibility. According to Article 39, the Security Council determines the existence of any threat to the peace, breach of the peace or act of aggression. If the Council concludes that a particular situation qualifies as such, it decides what measures that shall be taken to maintain or restore international peace and security. The Security Council's competence is exclusive in this respect. Articles 41 and 42 describe the kinds of measures that the Security Council can take.

Article 42 contains the most severe measures: The Security Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. However, the United Nations has never had military forces of its own. When the Security Council has mandated military operations under the provisions of Chapter 7, it has always delegated the military responsibility for carrying through the military operations to the member states.<sup>33</sup>

After the Cold War, the Security Council has authorised several military interventions: In Somalia in 1992 (Resolution 794), in Bosnia in 1993 (Resolution 836), in Rwanda in 1994 (Resolution 929) and in Haiti in 1994 (Resolution 940). The military intervention in Northern Iraq in 1991 was conducted with reference to Resolution 688, but there is some dispute about the legal status of this intervention (Semb 2000b: 473). The mentioned resolutions were passed because the Security Council considered the conditions *within* these countries as a threat to 'international

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<sup>33</sup> Note that according to the Charter, the *Security Council* undertakes those measures that it considers necessary to maintain international peace and security. Hence by giving the member states a military responsibility, the Security Council *makes use of* the member states' military forces in exercising the responsibility for international peace and security. UN-mandated operations are therefore the Security Council's responsibility according to the UN Charter. More and more often, however, one tends to think in opposite terms: That UN-mandated military operations are carried through *with the authorisation* of the Security Council. It should also be noted that if the Security Council is blocked and does not exercise its primary responsibility for collective security, the United Nations might recourse to the 'Uniting for Peace' procedure. The General Assembly can, with a 2/3 vote, recommend military measures, and has done so once, during the Korean War (see Helgesen 1999: 17–18; White 2000: 38–41).

peace and security’. There was no risk that the mentioned states would attack other states, however. Hence, the adopted resolutions demonstrate that the Security Council has stretched the concepts ‘threat to the peace’, ‘breach of the peace’ or ‘act of aggression’.

### 3.5.2 Is Beslutning S. nr. 2, 06.12.94 lawful according to the UN Charter?

I will now turn to Beslutning S. nr. 2, 06.12.94. Does it comply with the rules embedded in the UN Charter or not? The previous account has shown that the primary rule concerning the resort to military force in the UN Charter is a general prohibition on the resort to military force. The resolution therefore, if it is lawful, must come under one of the two exceptions to this rule.

In the introduction to this chapter I said that possible military operations for humanitarian purposes, in the state-centric perspective of international law, are considered offensive in nature. As the UN Charter prohibits offensive use of force unless the Security Council has authorised such action, Beslutning S. nr. 2, 06.12.94 is clearly unlawful as it establishes that Norwegian participation in operations for humanitarian purposes beyond the territory of NATO might take place in cases when the Security Council has given no authorisation to such operations.

What is there to say of out-of-area operations for purposes of self-defence? Are such operations in accordance with the other exception to Article 2 (4) – article 51 – concerning the right to individual or collective self-defence? It was noted in the introduction to this chapter that it is reasonable to suppose that NATO could be the first to transgress an international border even though a military operation is conducted with reference to self-defence. This means that military actions can take place *before* an armed attack has occurred towards any of the NATO members. This raises the question of whether Article 51 prohibits *anticipatory* self-defence or not.

According to Article 51, the right to collective or individual self-defence is triggered ‘if an armed attack *occurs* against a Member of the United Nations’ (italics added). The wording of this article implies that the use of force that falls short of an armed attack – for example isolated border incidents – does not warrant military self-defence. However, there was no definition of the phrase ‘armed attack’ in the records



of the San Francisco Conference, probably because the term was regarded as sufficiently clear and self-evident (Alexandrov 1996: 96). Some scholars maintain that Article 51 does not bar anticipatory self-defence. One reason they give is that Article 51 was not meant to restrict the customary right to self-defence before the UN Charter was adopted, which accepted anticipatory self-defence. Other scholars have argued that Article 51 actually was meant to restrict the customary right of self-defence (Alexandrov 1996: 100). Since Article 51 does not itself establish how an ‘armed attack’ is to be understood, we must assess how this rule has been interpreted. Stanimir Alexandrov (1996: 213) demonstrates that states have interpreted Article 51 restrictively. There has been a strong resistance among states to broaden the scope of self-defence to permit force except where there has been an armed attack or threat of an imminent attack. The International Court of Justice has affirmed this interpretation of Article 51. In its judgment on Nicaragua vs. USA, the Court found that the exercise of the right of individual or collective self-defence ‘is subject to the State concerned *having been* the victim of an armed attack’ (quoted in Müllerson & Scheffer 1995: 105, italics added). This suggests that there is no right to anticipatory self-defence and I may reasonably conclude, therefore, that out-of-area operations, even if conducted for purposes of self-defence, are unlawful according to the UN Charter.

### 3.6 Beslutning S. nr. 2, 06.12.94 and customary international law

As noted in section 3.4, international custom can replace international conventions. In assessing the lawfulness of Beslutning S. nr. 2, 06.12.94, this calls for an inquiry of customary international law. In order to give a definite answer as to whether Beslutning S. nr. 2, 06.12.94 is unlawful or not, I am now going to investigate whether an international custom expressing a different legal standard than the UN Charter had emerged in 1994. Is there evidence of an international customary rule that permits states to intervene in other countries irrespective of the Security Council’s decisions, for either of the following purposes?

- (i) To stop governmental oppression of a country’s citizens or to secure fundamental needs in the case of a humanitarian crisis, or

- (ii) To prevent instability in other countries from spreading to own territory.

I will adhere to state practise that is documented and interpreted by international law scholars in this section.

Often, a customary international rule concerning the resort to military force for the *protection of human rights* is referred to as the doctrine of humanitarian intervention. This doctrine has its roots in the Just War tradition, which emerged with St. Augustin in the 4th century. Today, it has several appearances. In a generic form, however, it says that a state or a coalition of states can intervene in another country's internal affairs if an overwhelming majority of the state's citizens are subjected to grave, systematic and widespread oppression. Moreover, the intervening state must not have political or economical interests that motivate it to undertake the intervention (Helgesen 1999: 24). A number of unilateral interventions with reference to human rights took place during the Cold War, in Congo (1964), in East Pakistan (1971), in Zaire (1978), in Cambodia (1978–79) and in Uganda (1979). These interventions were not recognised as humanitarian interventions by the international community: Both UN member states, the Security Council and the General Assembly have taken a reluctant stand towards these interventions (Helgesen 1999: 28–30). This suggests that none of the interventions constitute precedence for humanitarian intervention.

The doctrine of humanitarian intervention experienced a revival after the Cold War. In particular, the oppression of the Kurdish minority in northern Iraq in 1991 triggered a new debate about the doctrine. Today, there is a widespread consensus that human rights are not only a matter for the internal affairs of states; they concern the international community as a whole. As demonstrated in section 3.5.1, international law has developed in recent years as the Security Council acknowledges that human rights and humanitarian disasters are concerns of *international* peace and security. Is there, however, evidence that humanitarian intervention is established as customary international law?

Two interventions with clear humanitarian purposes – and lacking explicit UN mandate – were conducted before Beslutning S. nr. 2, 06.12.94 was passed: ECOWAS' peacekeeping operation in Liberia from 1990 and the intervention in

Northern Iraq in 1991. It has been argued that Operation Restore Hope in Northern Iraq, which was conducted to protect the Kurdish minority in the country, was a ‘pure’ humanitarian intervention. The British professor Christopher Greenwood maintains that this intervention established that humanitarian intervention has become customary international law.<sup>34</sup> In 1994, he wrote that the intervention had enjoyed ‘widespread (though by no means universal) acceptance’ (quoted in Helgesen 1999: 36) and this implies a changed state of the law. Do these single events constitute precedence? Are they sufficient to conclude that humanitarian intervention is established as an international custom? As noted in section 3.5.1, most international law scholars assert that Article 2 (4) is part of *jus cogens*. Although this does not prevent a new international custom from coming into existence, the evidence of a new customary rule must be substantial. Hence, isolated instances cannot be sufficient to say that a custom has emerged. In other words, there is not sufficient evidence to conclude that the UN Charter has been replaced by an international custom of humanitarian intervention. Although there has been an increasing concern for humanitarian considerations in international community, the international community has not recognised a right to intervention for humanitarian purposes. Since there is no international legal right to humanitarian intervention, Beslutning S. nr. 2, 06.12.94 must be found unlawful.

Is there evidence of a custom concerning interventions to *secure fundamental needs* in the case of a humanitarian crisis? This issue has enjoyed significantly less attention than the doctrine of humanitarian intervention. The evidence of a right to intervene irrespective of the Security Council is even poorer than in the case of governmental oppression: Only one such operation has been conducted, namely Operation Restore hope in Somalia in 1992. As noted in section 3.5, this operation was conducted under the Security Council’s auspices. Since the evidence of a new custom is even poorer here than in the case of intervention to prevent governmental oppression, the conclusion must be that a new custom has not emerged.

I will now turn to the last issue, whether there is a right to prevent violent conflicts in other countries from spreading to own territory. This concerns anticipatory

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<sup>34</sup> Other scholars have also argued in favour of a customary right to humanitarian intervention.

self-defence. Arend & Beck (1993) belong to a minority of international law scholars who assert that international custom has replaced the provisions concerning the resort to military force in the UN Charter (Arend & Beck 1993). They maintain that states through customary practice have withdrawn their consent from Article 2 (4) and assume an extended right to self-defence. They see anticipatory self-defence, which I found unlawful according to the UN Charter, as a clearly established custom (1993: 79). They explain that

[e]ven though there may not be an established consensus in support of the permissibility anticipatory self-defense, there is certainly not a consensus opposed to it. In consequence, it would seem to be impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for pre-emptive self-defense.

For reasons that I accounted for in section 3.4, one should not take the authority-control test for granted. To say that it is impossible to prove the existence of an authoritative and controlling norm prohibiting anticipatory self-defence is not sufficient to establish it being an established custom. For customary international law to emerge, states must perceive it as their legal *obligation* to behave in the specific manner.

Most international law scholars have argued that the rules concerning the resort to military force in the UN Charter express valid law. It is maintained that neither the general prohibition of the resort to military force in Article 2 (4) nor the exception in Article 51 have been replaced by international customary law. In the comprehensive book *Self-Defense Against the Use of Force in International Law*, Stanimir Alexandrov (1996) thoroughly examines state practice on the right to self-defence. He concludes (1996: 297) that the arguments that favour a right of self-defence expanded beyond the UN Charter are of doubtful validity. I will conclude that Beslutning S. nr. 2, 06.12.94 is not in accordance with the international right to self-defence.<sup>35</sup>

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<sup>35</sup> NATO's bombing in Afghanistan is conducted with reference to the right to collective self-defence. It is disputed, however, whether this military action is lawful. The disputed issues are the endurance of the operation, whether the terrorist attacks against the United States constituted *armed attack* and whether such attacks must be conducted by armed forces by states.

### 3.7 Conclusion

In this chapter I have argued that it is important to distinguish between moral principles and legislation in assessing what obligations that apply to states. I have also pointed at some basic arguments that suggest how states actually become obligated to adhere to rules of international law. Having explained why it is difficult to assess the content of rules of international law, I proposed a method for ascertaining the content of such rules. I then accounted for the rules concerning the resort to military force in international law. I concluded that Beslutning S. nr. 2, 06.12.94 clearly falls outside of the scope of the UN Charter, and must be found unlawful according to the Charter's provisions. I also concluded that there is poor evidence that customary international law has replaced the Charter provisions. Since there is no legal basis for the resort to military force for humanitarian purposes or for purposes of self-defence beyond the UN Charter, Beslutning S. nr. 2, 06.12.94 breaches the rules concerning the resort to military force in international law.

## 4 ESTABLISHING NORWAY'S FAIR SHARE OF THE BURDENS

I concluded in the previous chapter that Beslutning S. nr. 2, 06.12.94 represents a violation of the provisions concerning the resort to military force in international law. In determining whether Beslutning S. nr. 2, 06.12.94 is justified, therefore, I am now going to investigate the premise that Norway is obligated towards NATO to participate in out-of-area operations that the Security Council has not mandated. As pointed out in sections 1.2 and 2.4, Beslutning S. nr. 2, 06.12.94 can only be justified if such an obligation exists and if there were adequate reasons for having given priority to the obligation towards NATO.

I explained in section 2.4 that there is reason to believe that Storting's majority asserted that Norway should participate in non-UN-mandated out-of-area operations because it constitutes part of Norway's fair share of the burden as a NATO member. This implies that to determine whether participation actually constitutes Norway's fair share of the burden or not becomes a crucial task in investigating the justifiability of the resolution passed by the Norwegian parliament. A plausible reasoning behind this assertion is as follows: 'NATO is an international organisation that undertakes various tasks, and undertaking these tasks involves costs. These costs must in some way or other be distributed among the member states. One prerequisite for the distribution of burdens among the NATO members in 1994 to be *fair* is that Norway participates in out-of-area operations, also in cases when the Security Council has not authorised such operations.'

My principal task in this chapter will be to determine whether the premise that participation in out-of-area operations that lack Security Council approval constitutes Norway's fair share of the burden is valid. In practical terms, this task requires that I identify normative principles for fair burden sharing. Do normative burden-sharing principles suggest that Norway should participate in non-UN-mandated out-of-area operations?

The task of identifying normative principles for the *fair* distribution of burdens – just as identifying normative principles for the *fair* distribution of goods – raises the question of what fairness is. The International Encyclopaedia of Ethics (1995) defines fairness as a moral principle used to judge procedures for distributing benefits and burdens among parties. But what kind of moral principle should one apply?

Most contemporary literature focuses on the principle of *equality* in discussing what it is that makes a distribution system fair or unfair. More precisely, a distribution system is fair if its objective is to achieve or maintain equality among those who are subjected to the distribution. But equality has been, and is still, a disputed notion. What should there be equality of? Should a society distribute its goods and burdens with the aim of achieving equality of for example income, wealth, happiness, liberties or opportunities? Despite disagreement about what there should be equality of, the principle of equality will prove a fruitful approach in determining what it is that makes a distribution system fair or unfair: When applied on specific cases, this principle makes it possible to determine whether individuals should be subjected to different or the same treatment. One may assess whether there are justifiable reasons, for example, for distributing burdens differently between members of NATO.

I will account for and discuss different approaches to the principle of equality in the first section of this chapter (section 4.1). In this account, I will explain how equality may be used as a moral principle for distributing burdens. I will then (section 4.2) briefly show how equality may be achieved. Having accounted for the principle of equality and how it may be achieved, I will suggest two normative burden-sharing principles that will be thoroughly accounted for in the two subsequent in sections (4.3 and 4.4). The main objective of these sections is to test the validity of the principles and determine whether they are justified within the context of NATO burden sharing. In the last part of this chapter (section 4.5), I will on the basis of the burden-sharing principles assess whether participation in non-UN-mandated NATO operations constitutes Norway's fair share of the burdens as a NATO member.

## 4.1 The principle of equality

Bernard Williams (1962/1997: 110) has explained that the idea of equality is sometimes used as statements of fact, or what purport to be statements of fact – that men *are* equal – and at other times as statements of political principles or aims – that men *should* be equal. What does it mean that men are equal? One common answer to this question is that we are all equal *in one respect*: we are equal in being human beings (Lucas 1965/1997: 297; Williams 1962/1997: 110). Our common humanity constitutes our equality. The possession of certain (human) features, such as rationality, makes for our humanity and thus our equality. To be equal as human beings implies that we are entitled to or worth the *same treatment*: ‘Because we are men, we ought not to be killed, tortured, exploited and humiliated’ (Lucas 1965/1997: 297). The second idea, that human beings *should be* equal, implies that we at present are unequal or different. But since our common humanity makes us equal *qua* human beings, we must be unequal or different in other respects. I will soon return to this assertion.

Aristotle first formulated the idea that human beings can be both equal and unequal. This notion, as will soon be shown, constitutes the cornerstone in his approach to equality. To Aristotle, justice was the greatest moral virtue. In the *Nicomachean Ethics*, Aristotle explains that justice is a sort of equality: When he comes to grips with distributive justice (which is the assignment of a fair share of a good to individuals) in Book V, one of his first remarks is that ‘justice is equality, as all men believe it to be, quite apart from any argument’.<sup>36</sup>

In approaching the question of what equality is, Aristotle starts by defining a fair share: ‘And since what is equal (*ison*) [and fair] is intermediate, what is just is some sort of intermediate’ (1131a 15–17). A fair share is thus the intermediate; something between a share that is too large and too small. The intermediate is

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<sup>36</sup> Quoted in Vlastos (1962/1997: 121). I have tried to verify this quotation, but was unable to find it in Book V of the *Nicomachean Ethics*. Vlastos (1962/1997: 121) notes that Greeks in particular ought to agree with Aristotle on this point. The reason is that the ordinary word for equality, to *ison* or *isotes*, comes closer to being the right word for ‘justice’ than does the word *dikaiosyne*, which is usually translated to ‘justice’. Thus when someone speaks Greek he or she will be likely to say ‘equality’ (*ison* or *isotes*) and *mean* justice.



established by considering both the persons who are entitled to a share and the good that is subject to distribution:

And since what is equal involves at least two things [equal to each other], it follows that what is just must be intermediate and equal, and related to some people. In so far as it is intermediate, it must be between too much and too little; in so far as it is equal, it involves two things; and in so far as it is just, it is just for some people. Hence what is just requires four things at least; the people for whom it is just are two, and the [equal] things that are involved are two. (Book V, 1131a 17–20)

Aristotle says that justice consists in finding the intermediate share by considering the actors and the good. How, exactly, does one determine the share that a person is entitled to? According to Aristotle, the equality of the persons implies equality in the shares. This means that two equal persons are entitled to equal shares. There will be an *unjust* distribution ‘whenever either equals receive unequal shares, or unequals equal shares’ (1131a 24–25). In saying this, Aristotle established the equality formula: *Equals are to be treated equally and unequals are to be treated unequally*. Since equality may require differentiated treatment, the assumption must be that requiring the same treatment for all can be unfair.

When Aristotle tells us to treat equal cases alike and different cases differently, he tells us to act consistently and not capriciously. His equality formula, therefore, is simply the principle of consistency. This definition of equality may be called *formal* equality (Pojman & Westmoreland 1997: 2–3). In achieving equality, however, it is not enough to act consistently, as consistent policies can be unjustified. Consider the apartheid regime in South Africa. This regime consistently treated whites differently from blacks on an assumption that people with white skin colour have more worth than people with black skin colour. A person’s skin colour determined which political rights he or she enjoyed, what kind of work he or she might undertake and which places to live. The colour of the skin does make people different from one another, just as many other qualities – for example gender, nationality and degree of education – make us different. In fact, people are different in most respects. To confer people different rights on the basis of their skin colour, however, does not constitute an *ethically relevant reason* for this kind of differentiated treatment. Apartheid was unjustified because whites and blacks in South Africa were subjected to differentiated

treatment whereas they, in an ethical perspective, should have been subjected to the same treatment.

The opposite case – consistently treating unequals as equals – is not any better. Child work was institutionalised with the emergence of the industrial revolution. In requiring both children and adults to work, the industrialists subjected these two highly different groups to the same treatment. From the beginning of the 19<sup>th</sup> century, however, legal provisions restricting, controlling and eventually forbidding child work were passed. Western governments realised that children and adults, being unequals, no longer could be subjected to the same treatment. Amartya Sen (1992: 1) emphasises the importance of considering those traits that make people unequal:

The assessment of the claims of equality has to come to terms with the existence of pervasive human diversity. The powerful rhetoric of ‘equality of man’ often tends to deflect attention from these differences. [...] [T]he effect of ignoring the interpersonal variations can, in fact, be deeply inegalitarian, in hiding the fact that equal consideration for all may demand very unequal treatment in favour of the disadvantaged.

Since it is not enough to act consistently in achieving equality, we must fill the equality formula with content. This means that we must establish what differences it is that *in an ethical perspective* qualify to differentiated treatment. Because human beings are equal *qua* human beings, we have to provide a normatively justifiable reason or principle for any difference in the way people are treated. If such a reason or principle cannot be given, people have to be subjected to the same treatment.

What constitute ethically relevant reasons for differentiated treatment? Aristotle argues that merit or worth determines whether people should be treated as equals or unequals: ‘For everyone agrees that what is just in distributions must fit some sort of worth<sup>37</sup> [...]’ (*Nicomachean Ethics*, Book V, 1131a 25–26). Aristotle’s conception of human worth differs from ours: He does not believe that human beings are equal *qua* human beings. Hence his notion can easily be misunderstood and even misused. But he does recognise that there are competing standards of what makes for different merit or worth:

[B]ut what they call worth is not the same; supporters of democracy say it is free citizenship, some supporters of oligarchy say it is wealth, others good birth, while supporters of aristocracy say it is virtue. (*Nicomachean Ethics* 1131a 26–30)

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<sup>37</sup> The Greek word is *axia*. This word is translated both into ‘worth’ (Terrence Irwin in Michael L. Morgan’s volume) and ‘merit’ (David Ross in the Oxford World’s Classics).

Aristotle's notes, in other words, that although we all agree that goods should be distributed according to worth or merit, we do not all share a common understanding of these concepts (Yack 1993: 164–165).

Disagreement about *what* constitutes relevant reasons for differentiated treatment in Aristotle's time – free citizenship, wealth, good birth or virtue – continues today. The disagreement about what are qualifying reasons for differentiated treatment reflects disagreement about what there should be equality of. Those who argue in favour of differentiated income tax, for example, see equality as income levelling. In sections 4.3 and 4.4 I will demonstrate how this applies to burden sharing. It is important to note that demanding equality in one respect often leads to inequality in other respects. As Amartya Sen (1992: x) explains:

[A] libertarian demanding equal rights over a class of entitlements cannot, consistently with that, also insist on equality of incomes. [...] Wanting equality in what is taken to be 'central' social exercise goes with accepting inequality in the remoter 'peripheries'.

This suggests that one important challenge in assessing the fairness of a distribution system is to determine whether one form of equality is more justifiable than another. It will be demonstrated in subsequent sections how different forms of equality collide.

As mentioned in section 4.1, the purpose of the following sections is to establish normative burden-sharing principles for the purpose of determining whether participation in non-UN-mandated out-of-area operations constitute Norway's fair share of the burdens as a NATO member. The previous account suggests that to identify burden-sharing principles means to ask: What differences, if any, constitute justified reasons for differentiated burden sharing? What, if anything, qualifies to differentiated treatment when burdens are to be distributed between members of a co-operative scheme? I will suggest two variables:

- (i) The ability to pay

Within a burden-sharing context, I will call this the ability-to-pay principle

- (ii) The individual need

Within a burden-sharing context, I will call this the principle of equality of satisfaction of needs

I will thoroughly account for the two principles and investigate their justification in sections 4.3 and 4.4. John Stuart Mill discussed the principles in *Principles of Political Economy* (1849) and I will partly draw on Mill's writings in the following two sections. Adam Smith spoke of the principles earlier, in *The Wealth of Nations*<sup>38</sup> (1776). Neither Mill nor Smith accounted for these principles in detail, however. Moreover, both recent and older literature on NATO burden sharing tends to take the normative issues of burden sharing for granted, moving directly to discussing *de facto* burden sharing (see Hartley & Sandler (1999); Kennedy (1979); Lunn (1983)). For these reasons, I will to some extent proceed by way of independent reasoning.

## 4.2 How to achieve equality

Before I explore the two suggested burden-sharing principles, I would like to briefly account for three ways in which equality can be achieved (Pojman & Westmoreland 1997: 5), as the distinction will prove useful in the normative discussions to come. Firstly, we can bring the worst off and everyone in between to the level of the best off (up-scaling). Secondly, we can bring the worse off up and the better off down so that they meet somewhere in between. Thirdly, we can bring the best off and everyone in between to the level of the worst off (down-scaling).

The first solution is intuitively appealing. Often, however, resources are limited. This is, in the language of economics and political science, a null-sum situation: As there is a limited amount of resources to be distributed, one person's gain means another's loss. This, it seems, is what applies to most co-operative schemes: A certain amount of goods – the total sum of the members' contributions – is subject to distribution. Thus to improve the situation of the worse off presupposes that the better off renounce something.

## 4.3 The ability-to-pay principle

In section 4.1 I concluded that equality does not necessarily mean that everybody should be treated alike. Any difference in the way people are treated, however, must

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<sup>38</sup> Book V, Chapter II, Part II *Of Taxes*.

be justified on the basis of a reason or a principle. In this section, I am going to discuss one candidate for differentiated treatment in the context of burden sharing: The ability-to-pay principle. Instead of treating members of a co-operative scheme alike, which in practical terms means to require the same contribution from each of them, one might gear contributions to each participant's ability to pay or to contribute. More specifically, the suggested principle has for its object that each participant of a co-operative scheme is to carry a share of the burden in proportion to the ability to pay.

This section starts (section 4.3.1) with an account of the concept 'ability to pay' and demonstrates that the ability to pay varies from one context to another. On this background, I will show what it is that determines the NATO members' ability to pay to the organisation. I will then (section 4.3.2) give a philosophical explanation for the ability-to-pay principle in order to test its validity. As will be shown, the ability-to-pay principle conflicts with other considerations. For this reason, I will also test the validity of the principle by investigating its implications. In doing this, it will be established whether NATO burdens should be distributed in proportion to the members' respective ability to pay.

#### 4.3.1 The concept ability to pay

It was noted in the previous section what primarily characterises people is their differences and not their likenesses. People are different in most respects, and differences in their qualities imply differences both in *how much* and *what* they can produce. At the international level, the case is the same. States, just as persons, are different in many respects. Because of their differences, their ability to make contributions to those international organisations of which they are members will vary.

This is not to say that *any* difference between states (or people) implies differences in the ability to pay. For example, the difference in Canada and Guatemala's geographical area does not make the two countries' ability to pay to the United Nations different. However, the differences in wealth do: Since the United Nations requires economic contributions from its members, Canada's ability to pay will be greater than Guatemala's. Within other contexts, however, wealth is less important. The Kyoto regime requires that the participants reduce their green house

gas emissions. This means that the participating countries' ability to pay is given by conditions such as their coal, oil and gas dependency. In conclusion, the ability to pay is given by what the undertaking at hand requires from its members and thus varies from one undertaking to another.

NATO was founded for the objective of enhancing peace in the North Atlantic region, and the security of its existing 19 member states remains its main objective. In order to achieve this goal, the organisation requires its members to make both economic and military contributions: The members contribute to NATO both in the form of cash payments for NATO's common budgets and payments-in-kind through the allocation of national forces to NATO command (Hartley & Sandler 1999: 668). This implies that each member state's ability to pay will be given by its wealth, size of the population and military capabilities. In section 4.5 I will more thoroughly discuss the concept of ability to pay within NATO.

#### 4.3.2 Testing the validity of the ability-to-pay principle

Is the ability to pay a justified burden-sharing principle? As will now be demonstrated, the ability-to-pay principle relies on a more general principle. Consider the United States and Turkey as NATO members. While the United States comes off best with respect to the three variables that were mentioned above (wealth, size of the population and military capabilities), Turkey is both a smaller, militarily weaker and less wealthy country. To treat these countries alike – to require identical contributions from them – would be to require very different *efforts*. In terms of both economic contributions and military capabilities, Turkey would have had to make much greater efforts than the United States if the two countries were to carry the same shares of the burden. This suggests that one should subject members of co-operative schemes to different treatment with the aim of requiring the same effort from each of them.

John Stuart Mill argued that burdens ought to be distributed in proportion to people's ability to pay. He justified the ability-to-pay principle in the following way (1849/52: 366, italics added):

[I]n a case of voluntary subscription for a purpose in which all are interested, all are thought to have done their part fairly when each has contributed *according to his means*, that is, has made an *equal sacrifice* for the common object [...].

Differentiated treatment on the basis of the ability to pay leads to *equal sacrifice*. According to Mill, the ability-to-pay principle is justified because everyone should make an equal sacrifice. By distributing burdens in proportion to each individual's means, everyone will 'feel the same pain'. It appears more reasonable if participants of the same undertaking make equal efforts or sacrifices than if some suffer more than others. Since the consideration of equal sacrifice supports the ability-to-pay principle, the principle is strengthened.

One objection could be raised against the ability-to-pay principle, however: It is unfair if more advantaged members of an undertaking are to make an equal sacrifice as the less advantaged just because they happen to be advantaged. This argument, as will be demonstrated in the following, is particularly relevant to undertakings of NATO's kind.

NATO is what we may call a targeted undertaking: Its specific purpose is to enhance the members' security. Most undertakings are targeted; they are founded for a specific purpose and are, accordingly, limited in scope. Athletic organisations, environmental organisations and political parties are all targeted organisations, limited in purpose to physical display, the protection of the environment and political activity respectively. Of importance in this context is that membership in a targeted organisation will only affect a certain part of the members' existence.

There is also membership in what we may call all-encompassing undertakings. Citizenship of a country and perhaps membership in a religious sect are two such memberships. To be a member of an all-encompassing organisation affects the individual's existence in (more or less) every respect: Our citizenship, for instance, determines what rights to health, education, welfare, work, protection, cultural and religious display etc. we have.

To hold all-encompassing undertakings responsible for our abilities seems more reasonable than to hold targeted undertakings responsible for it. All-encompassing undertakings have a greater impact on our abilities than targeted organisations because they concern so many aspects of life. When it comes to NATO, differences in the ability to pay between the members are not caused by the membership itself but by conditions beyond the membership. The fact that for example the United States as a

NATO member is more advantaged – and thus more capable of contributing to the alliance – than Turkey, is not conditioned by the two country's membership in the alliance; it has quite different explanations. In this perspective, it appears unfair that the United States should carry a greater burden than Turkey.

Robert Nozick (1974/91) emphasises the individual's right to *choose* where to transfer his or her own holdings when he discusses the legitimacy of distributional arrangements to achieve greater equality. According to Nozick (1974/91), it is insufficient to look at the distributional profile. The acid test of whether a given distributional arrangement is legitimate or not is the way in which the distribution came about; whether it results from people's own choice or not. What Nozick actually argues in favour of, then, is that the right to choose where to channel one's assets must take precedence over equality of material condition. This libertarian argument, it seems, is particularly relevant to the case of burden sharing in NATO, as the allies' holdings are not acquired through the organisation, but independently of it.

These remarks point towards the conclusion that we are facing incompatible considerations: On the one hand, there is the consideration not to impose a greater burden on someone just because this individual happens to be advantaged. On the other hand, there is the consideration of equality of sacrifice. What is to be preferred? In order to answer this question, I will attempt in the following to test the validity of the ability-to-pay principle by investigating implications of the principle and the principle's opposite.

What implications follow if burdens are distributed regardless of abilities? I will take NATO as my point of departure and proceed from the previous example of Turkey and the United States. Being less populous, less wealthy and militarily weaker, Turkey's ability to contribute to NATO is smaller than that of the United States, and hence Turkey would have had to make enormous efforts compared to the United States if the two countries were to contribute identical shares to the alliance.

Because of its greater efforts, Turkey would to a lesser extent than the United States be able to allocate its resources to other international or national tasks. The United States, however, would obtain a proportionally greater pot to undertake other tasks. Hence a burden-sharing system that distributes burdens regardless of the



participants' ability to pay would strengthen the more advantaged participants to the detriment of the less advantaged. The burden-sharing system, in other words, would reinforce differences in the participants' abilities. In this case, it is the combination of the more advantaged becoming even more advantaged with the disadvantaged becoming even more disadvantaged which, from a moral point of view, is difficult to accept. A burden-sharing system that does not worsen the situation of the less advantaged, however, appears more acceptable.

To subject members of co-operative schemes to different treatment on the basis of their ability to pay, however, would not lead to greater discrepancies in the ability to pay: Equal sacrifices preserves the initial ability to pay. Thus the ability-to-pay principle, one might argue, relies on another general principle as well, namely to avoid worsening the situation of the worse off. This, it seems, also strengthens its validity.

Nevertheless, it has been demonstrated that the ability-to-pay principle entails a loss for the more advantaged in that it imposes a greater burden on them. To determine which principle is more justifiable, it should be considered for whom the loss is hardest to bear. John Stuart Mill justified the ability-to-pay principle by maintaining that the loss is hardest to bear for the least advantaged (1849/52: 368):

If any one bears less than his fair share of the burthen, some other person must suffer more than his share, and the alleviation to the one is not, *caeteris paribus*, so great a good to him, as the increased pressure upon the other is an evil. Equality of taxation, therefore, as a maxim of politics, means equality of sacrifice.

In other words, the loss that relates to becoming more disadvantaged is greater than the loss of paying a greater burden. Here, I believe, we find ourselves at a normative endpoint. I do not see any intuitive objections against Mills' assertion, which means that my conclusion is that the ability-to-pay principle is justified, also for organisations of NATO's kind. The conclusion is thus that for NATO burden sharing to be fair, burdens should be distributed in proportion to the members' respective means, defined as military capabilities, wealth and size of the population.

#### 4.4 The principle of equality of satisfaction of needs

In this section, I will test the validity of the principle of equality of satisfaction of needs, which is the second of the two proposed principles. This principle prescribes

that each participant of an undertaking is to receive benefits that meet the individual need. Thus according to this principle, I will receive a greater share of the benefits of a scheme of co-operation than someone's whose needs are smaller than mine. The reason why this principle should be investigated is that satisfying my needs presupposes that someone actually carries a burden – makes a contribution – that covers my needs. The crucial question is who should pay to cover my needs. Is it myself or my fellow participants?

I will first account for two basic features of the principle of equality of satisfaction of needs and show that this principle leads to inequality in another respect (section 4.4.1). I will then (section 4.4.2) test the validity of this principle for the purpose of determining whether burdens should be distributed for the aim of achieving equality of satisfaction of needs within NATO.

#### 4.4.1 The principle of equality of satisfaction of needs

The principle of equality of satisfaction of needs prescribes that each participant of an undertaking is to receive benefits that meet the individual need.<sup>39</sup> Generally, a distribution system will equally meet the participants' respective needs if two criteria are fulfilled.

Firstly, unequal *degrees of need* are to be unequally met. The benefits are to be distributed *in proportion to* the participants' respective needs. Ideally, there should be a 100% needs satisfaction for all. Suppose two sisters are going to the same university, A living at five kilometres' distance and B at fifty kilometres' distance from the university. The difference in distance gives rise to different degrees of need: While A's daily need of going to the university can be met by giving her a bike, B needs a car, which is more expensive. If their parents can afford both a bike and a car, but nothing more, A should be given a bike and B a car according to the principle of equal satisfaction of needs.

In cases where there are not enough resources to fully meet everybody's needs, however, things become a lot more complicated. How are everyone's needs to be

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<sup>39</sup> A more thorough account of the concept of need follows in the next section.

‘equally met’ in such cases? One possibility consists in distributing benefits *proportionally* to the needs. For example, A could get running shoes and B a bike, which means that they would both get *something*, although not enough to fully meet their respective needs. Another possibility consists in distributing benefits *disproportionally* to the need. B could get a car and A nothing, as it would take B several hours to get to the university by bike, while A could get there within an hour. This issue will be thoroughly discussed in the next section.

Secondly, different *kinds* of needs must be differently met. For there to be equality of satisfaction of needs, it is crucial to take into account *what* the participants’ needs are. If A, who is allergic to apples, is twice as hungry as B, one does not equally meet their needs by giving two apples to A and one apple to B.

The previous account demonstrates that to achieve equality of satisfaction of needs presupposes that one carefully considers how to distribute the benefits. Within a scheme of co-operation, it will sometimes be imperative to consider how to distribute the burdens as well. Suppose burdens are distributed *in proportion to* the received benefit. In that case, one will impose a greater burden on those whose needs are greater than on those whose needs are less. Such a burden-sharing arrangement is ‘to supply with one hand while confiscating with the other’. No surplus is left over for those whose needs are greatest, and hence differences in the satisfaction of needs might prevail.<sup>40</sup>

Suppose, contrarily, burdens and benefits are distributed *regardless of* the received benefit: Those whose needs are greater, and who receive more, carry either a smaller or an identical share of the burden than those whose needs are greater. This will lead to a surplus which will be beneficial for those whose needs are greater. For this reason, this distribution principle will promote equality of satisfaction of needs. This principle, however, also has the implication that those whose needs are lesser will bear a loss.

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<sup>40</sup> This will depend on the nature of the need and the nature of contribution. If my need can be met by receiving a warm jacket while I can pay in proportion by giving one of my many expensive hats, to require a proportionate contribution will not necessarily contradict equality of satisfaction of needs. If I have no possessing, however, my need will not be met by giving me a warm jacket and requiring me to pay in proportion to the received. I will presuppose that a surplus is necessary meet the individual need in the following.

When distributing burdens in proportion to the received benefit, it will be advantageous for those whose needs are lesser. When distributing burdens regardless of the received benefit, however, it will be advantageous for those whose needs are greater. What must be determined is whether one should favour those with the greater needs or those with the lesser needs.

#### 4.4.2 Testing the validity of the principle of equal satisfaction of needs

One possible justification for equality in general and for equality of satisfaction of needs in particular is that equality is a goal *per se*. In this perspective, equality is what we may call an intrinsic or an immanent value. It was noted in section 4.2 that there are three ways in which we can achieve equality. If we accept the justification that equality is a goal *per se*, we must accept all three ways of achieving equality. It would be inconsistent to say that up-scaling and meeting in between is justifiable, while down-scaling is not, for the purpose of achieving equality itself.

The French aristocrat Alexis de Tocqueville was amazed at the preoccupation of Americans for equality during his visit to the United States in the 1830s, but also warned against its dangers:

There is indeed a manly and legitimate passion for equality which rouses in all men a desire to be strong and respected. This passion tends to elevate the little man to the rank of the great. But the human heart also nourishes a debased taste for equality, which leads *the weak to want to drag the strong down to their level* [...] (quoted in Pojman & Westmoreland 1997: 5, italics added).

According to de Tocqueville, to want equality can turn out both productively and destructively. One of the dangers de Tocqueville sees in ‘the passion for equality’ is down-scaling. Thus by accepting equality as a goal *per se*, we must be ready to ‘dumb down the brilliant, infuse the healthy with disease and blind the sighted’ (Pojman & Westmoreland 1997: 5). When it comes to equality of satisfaction of needs, we must, for example, be ready to make the satiated starve for the sake of equality of satisfaction of needs itself. Needless to say, these implications are intolerable. Down-scaling as a means to achieve equality should thus be rejected. Since, as noted, down-scaling must be accepted just as the two other forms of achieving equality for equality

itself, this suggests that a possible justification for the principle of equality of satisfaction of needs must be sought in other normative considerations.

As noted in section 4.2, resources are often limited and up-scaling is not possible. Accordingly, we are left with the second method for achieving equality that was mentioned above: To bring the worse off up and the better off down so that they meet somewhere in between. The crucial normative question thus becomes: Why should someone renounce a benefit for the sake of others' welfare? What normative reasons suggest that we should require a person to give up a benefit for another person in order to have equality of satisfaction of needs?

The justification for equality need not necessarily be sought in equality having an intrinsic value. Equality can also have an *instrumental* value: Equality can be justified because it is a means to achieve other goals that we value. In coming to grips with a justification for the principle of equal satisfaction of needs, I am now going to investigate what *goals* that might justify that someone will have to give up a benefit.

Kai Nielsen maintains that people should receive equal welfare because 'morality requires that we attempt to distribute *happiness* as evenly as possible' (quoted in Pojman & Westmoreland 1997: 5, italics added). In demanding equal welfare for the purpose of equal happiness, Nielsen makes himself a proponent of the principle of equal satisfaction of needs: Equality of satisfaction of needs, to him, consists in *preference* satisfaction: If happiness is to be distributed as evenly as possible, we must make sure that people get their preferences satisfied. Thus 'needs' is understood as whatever preferences we have. This implies that if my preferences require a new wardrobe every week to make me happy, I have an equal right to this as the one who is happy with getting a new shirt every five years has a right to that.

This standpoint, however, is only partly helpful. How are we to distribute resources when everybody's preferences cannot be fully met? To have an equal *degree* of happiness, should my expensive preferences be met at the expense of other people's preferences, or even basic needs? Are all preferences to count as equal?

It becomes necessary to distinguish between different kinds of needs. Charles Larmore makes this distinction in explaining that there are four different sorts of things that are good to people (1987: 139):

1. The avoidance of physical pain
2. The satisfaction of needs
3. Whatever satisfies short-term preferences, and
4. Whatever fulfils long-term preferences (projects and commitments)

By needs (2), Larmore understands desires that we have not because we have adopted them, but in virtue of ‘our being the sort of being we are’ (Larmore 1987: 139). Thus desires for food and sleep would be needs. What Larmore calls needs could be understood in the context of basic conditions for living, and thus called basic needs. Preferences, by contrast, are desires we have because we have adopted them. These are distributed between (3) and (4).<sup>41</sup>

(1) and (2) have the properties of unanimity and objectivity because we generally agree on what it means to avoid physical pain and have our (basic) needs met. There is, however, far less unanimity as to the two latter sorts of good. People largely differ about what is good with regard to short-term and long-term preferences. Moreover, and most importantly, (1) and (2) have an *urgency* that the other forms of good do not have. They have an *objective urgency* because they are distinct from any subjective feeling of urgency that a person may have. Preferences can be held so strongly as a need, and yet not be as urgent. Larmore (1997: 140–142) maintains that since the avoidance of physical pain and satisfaction of needs have an objective urgency, we should pursue their fulfilment:

[I]f I agree with Y that he has a certain need, then I and everyone else have a reason to pursue its satisfaction. [...] When the greater good overall consists in the avoidance of pain or the satisfaction of needs, [...] we cannot so easily pass over its claims upon us. If we have it in our power to satisfy the needs of others or to prevent their having physical pain, and if the good thereby effected is sufficiently great, we may well feel obligated to set aside temporarily the pursuit of our own projects.

This points towards the conclusion that we are required to renounce a benefit in the particular case that someone is in pain or does not have his or her (basic) needs met. The requirement is not equally strong if the purpose is to renounce a benefit for the sake of someone’s preference, because preferences are not as urgent as needs. In other

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<sup>41</sup> Larmore (1987: 140) admits that the boundary between needs and preferences is not always a sharp one. Physical activity is perhaps one example of it: Enjoying it implies that it is a preference, but some maintain that physical activity is necessary to avoid mental or physical diseases, which implies that it is a need.

words, there is not necessarily something wrong with a *gap* in preference satisfaction. At least we can tolerate it. A *deficit* in needs satisfaction, however, is intolerable. This is not to say that there might not be good reasons for redistribution for less urgent needs as well. One such reason could be to prevent envy or even conflict, but I am not going in details with it here.

The previous discussion gives us the following two interpretations of the principle of equal satisfaction of needs, each with its respective area of validity:

(i) In a context where urgent needs are at stake, redistribution is justified. This means that someone who is well off – or at least better off than someone who has not his or her basics needs met – will have to renounce something for the sake of the other person's welfare. Equal satisfaction of needs means that everyone should have their basic needs met. In a burden-sharing context, this implies that burdens should be distributed regardless of the received benefit.

(ii) In a context where preferences are at stake, the claim that the better off should renounce something for the less well off is not equally strong because preferences do not have the same urgency as needs. Equal satisfaction of needs, in such cases, would generally mean to distribute benefits in proportion to everyone's preferences. In a burden-sharing context, this implies that burdens should be distributed in proportion to the received benefit.

We have now come to the issue of determining whether NATO burdens should be distributed regardless of or in proportion to the received benefit. Given the previous discussion, this answer must depend on the urgency of the members' needs. If urgent needs are at stake, burdens should be distributed regardless of the received benefit so that these needs can be met. By distributing burdens regardless of the received benefit, one avoids a *deficit* in the satisfaction of needs. If less urgent needs, or preferences, are at stake, burdens might be distributed in proportion to the received benefit as there will not be a deficit in satisfaction of needs, only a *gap* in the satisfaction of preferences.

It is a general assumption that among a population's many needs, security is essential. An armed attack from a foreign power might lead to many casualties and in general damage the population's conduct of life. Security, thus, must be characterised

as a *need* according to Larmore's (1987: 139) typology. This points towards the conclusion that burdens should be distributed regardless of the received benefit.

John Stuart Mill (1849/52: 368) argued that if the beneficiaries of protection of government were to pay in proportion to their benefits, there would be an unjust result. The reason is that it is a so-called wrong of nature if people are not able to help or defend themselves:

If there were any justice, therefore, in the theory of justice now under consideration, those who are least capable of helping or defending themselves, being those to whom protection of government is the most indispensable, ought to pay the greatest share of its price: the reverse of the true idea of distributive justice, which consists not in imitating but redressing the inequalities and wrongs of nature (1849/52: 368).

This assertion seems applicable to the case of a defence alliance as well: In the case of protection, what X must suffer by not having his security needs met is worse than what Y must suffer not to enjoy full benefits of the co-operation. Again, we find ourselves at a normative endpoint. As I neither here see any intuitive objections against Mill's assertion, and since I consider security to be among a country's basic need, my conclusion is that it is morally justifiable that those NATO countries enjoying a security surplus should renounce this for the sake of another ally's security. Thus NATO burdens should be distributed regardless of the received benefit.

## 4.5 Establishing Norway's fair share

In the two previous sections I have concluded that for NATO burden sharing to be fair, each member's share of the burden should be determined upon consideration of its ability to pay and regardless of the received share of the total sum of benefits. What constitutes Norway's fair share of the NATO burden?

It was noted in section 4.3 that the ability to pay is a multi-dimensional concept and that the ability to pay within NATO is given by the member states' wealth, size of the population and military capabilities. In order to more precisely estimate the ability to pay, we must now give these concepts an operational meaning.<sup>42</sup> Different measures have been suggested to estimate the ability to pay (Hartley & Sandler 1999; Kennedy

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<sup>42</sup> The meaning of 'the size of the population' is self-explaining.



1979; Lunn 1983). Hartley & Sandler (1999) suggest the six following ability-to-pay measures:

- (i) Gross domestic product (GDP)
- (ii) GDP per capita
- (iii) Defence spending
- (iv) Per capita defence spending
- (v) Defence as a share of GDP
- (vi) Armed forces personnel

These indicators measure different aspects of an ally's ability to pay: While (vi) is a purely military indicator, the others are economic indicators, (iii), (iv) and (v) measuring defence spending. Can we use these indicators to determine how burdens should be distributed in proportion to the ability to pay? I shall first consider the indicators' operational validity.

The GDP (i) is a useful indicator of the ability to pay because it measures the size of the allies' economy. This indicator prescribes that countries with a large economy should contribute more than countries with a smaller economy, which appears reasonable. However, the GDP does not measure the allies' wealth. A country's wealth is an important aspect of the ability to pay as richer countries more easily can allocate resources to NATO than less rich countries. Hence, this should be considered in distributing burdens. We may assess the allies' wealth by dividing GDP by the population. Hence (ii), GDP per capita, measures the allies' wealth. It suggests that the greater a country's GDP per capita, the greater the share of the burden it must carry.

Although the GDP (i) and GDP per capita (ii) measure important aspects of an ally's ability to pay, these indicators do not take into account military capability. Since NATO is a defence alliance, the member states' ability to pay will also be given by their military capabilities. This suggests that indicators measuring military capabilities should be used as well.

Defence spending (iii), per capita defence spending (iv) and defence as a share of GDP (v) are different indicators of military capabilities, in assuming that military strength grows proportionally with defence spending. Per capita defence spending (v)

and defence as share of GDP (vi) measures the degree to which defence is given priority compared to other tasks for a given country. These indicators, however, are not entirely reliable as measures of the ability to pay, as there will be differences in the efficiency with which the member states convert defence expenditures into combat-effective armed forces. Some allies might have inefficient forces, which would not be evident from these indicators. Moreover, the member states can differ in their definitions of defence spending and some countries rely on conscript forces so that their different defence budgets underestimate their defence burdens (Hartley & Sandler 1999: 669).

The armed forces personnel indicator (vi) is also intended to measure the allies' military capabilities. We can reasonably assume that a country's military strength increases proportionally with the number of armed forces personnel. Being a numerically based indicator, however, it fails to measure differences in the national forces' effectiveness and cleverness. It also fails to measure possible differences in the quality of the military equipment. Hence, important aspects of military strength are left out.

This brief account demonstrates that every suggested measure suffers from validity weaknesses, and several other problems of validity could also have been mentioned.<sup>43</sup> This implies that it is not impossible to assess the exact shares that each ally should bear on the basis of their ability to pay.

Suppose, nevertheless, that we were willing to accept this inaccuracy and that a burden-sharing formula was established on the basis of one or several of the mentioned indicators. What would this formula suggest in terms of participation in non-UN-mandated out-of-area operations? Suppose armed forces personnel were used as an indicator of Norway's ability to pay. In that case, Norway's fair share of the burden would be estimated on the basis of its share of NATO's overall military personnel. In 1995, Norway's armed forces personnel (38 000) constituted 0.8% of NATO's total armed personnel (4 700 000) (Sandler and Hartley 1999: 672). This implies that Norwegian armed forces personnel should constitute 0.8% of the total

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<sup>43</sup> For a more thorough account of this, see Hartley & Sandler 1999; Kennedy 1979: 59–83; Lunn 1983: 54–55.

number of armed forces personnel in NATO military operations. Other indicators suggest other contributions: The GDP indicator, for example, suggests that Norway's economic contributions to NATO should be 8.13% of the total costs, as Norway's GDP constituted 8.13% of the total NATO GDP in 1995 (Sandler & Hartley 1999: 672).

These numbers suggest what Norway's fair share of the NATO burdens consists in. However, the trouble with giving the ability-to-pay principle an operational meaning by employing these, and the other, measures is that they do not establish *in what form* the fair share must be given. To say that Norway's fair share consists in paying 8.13% of the total NATO budget does not establish that this amount of money must be spent on *non-UN-mandated out-of-area operations*. Moreover, Norway's armed forces could just as well be deployed to peacekeeping operations as to non-UN-mandated out-of-area operations; Norway would still be said to carry its fair share of the burden.

Any indicator may be used to prescribe a mathematically precise share, but neither of them establishes that Norway ought to participate in out-of-area operations that the Security Council has not mandated. In conclusion, burden-sharing principles do give normative prescriptions about the share that Norway should bear: They give prescriptions as to the *extent* of Norway's contribution. But the principles, it now seems clear, do not establish what specific tasks that Norway should undertake.

## 4.6 Conclusion

I started this chapter by arguing that one should invoke the principle of equality when determining what Norway's fair share of the NATO burdens consists in because the principle of equality allows for an assessment of whether individuals should be subjected to the same or to differentiated treatment. I then investigated the validity of two normative principles that prescribe differentiated treatment within the context of burden sharing: The ability-to-pay principle and the principle of equality of satisfaction of needs. A thorough account of these principles demonstrated that they are justified and apply to burden sharing within NATO. I then asked what Norway's fair share of the NATO burdens is. The following account showed that while burden-

sharing principles do give prescriptions about the extent of Norway's fair share of the burden, they do not establish what specific tasks that Norway should carry out. Hence, assessing what Norway's fair share of the burden consists in proved inappropriate for determining whether Norway is obligated towards NATO to participate in non-UN-mandated out-of-area operations. This means that the normative premise that Norway should participate in non-UN-mandated out-of-area operations has so far not proved valid.

## 5 THE MORAL REQUIREMENT TO RECIPROCATE

In the previous chapter I concluded that burden-sharing principles do not establish whether Norway should participate in non-UN-mandated out-of-area operations or not. There is nevertheless reason to pursue the question of whether Norway should make this contribution to NATO. Although the Storting passed Beslutning S. nr. 2, 06.12.94 on invalid moral assumptions, it might well be that other moral arguments suggest that Norway is obligated to undertake this kind of task. Accordingly, other possible normative reasons than burden-sharing principles should be explored.

One argument suggesting that Norway should participate in out-of-area operations that lack Security Council mandate is that Norway *owes* NATO this kind of contribution. This argument is the principle of reciprocity, which requires beneficiaries to make returns for good received. The principle of reciprocity as a source of moral obligation has so far enjoyed modest attention in international normative theory. In this chapter and the following one, I am going to assess this principle's relevance for Norway's membership in NATO. In particular, I will be concerned with determining whether Norway's membership in NATO has yielded benefits that generate an obligation to make returns. If an obligation of reciprocity exists, does it require that Norway to participate in non-UN-mandated out-of-area operations?

I will thoroughly account for and discuss the moral requirement to reciprocate in this chapter. I will explain what reciprocity is and account for the moral requirement to reciprocate as it has been spelled out in philosophy and sociology (section 5.1.1). I will then (section 5.1.2) explore possible justifications for the requirement. Having established what the moral requirement to reciprocate actually requires, and suggested different justifications for it as well, I will ask what we must make returns for (section 5.1.3). I will then test the validity of the principle of reciprocity by investigating its implications (section 5.1.4). This test will demonstrate that the requirement, as it has been formulated, has problematical implications. I will therefore attempt at reformulating the requirement in section 5.2. In the next chapter, I will discuss the moral requirement to reciprocate with the particular aim of determining whether

Norway is obligated towards NATO to participate in military operations beyond the territory of NATO that lack a UN mandate.

### 5.1 The moral requirement to reciprocate

The concept of reciprocity connotes both normative and empirical aspects. First and foremost, though, reciprocity is a word that refers to the latter, to a *state of affairs*, to be precise. Reciprocity is the outcome of a two-way process. Reciprocity is what comes into existence because something is *returned*. Reciprocal affection, for example, is found when two persons' affection towards one another is mutually returned. A's affection towards B and B's affection towards A give rise to reciprocal affection because A's feelings towards B are returned by B and B's feelings towards A are returned by A.

Reciprocity, or a reciprocal relationship, may also arise from people's actions. In this respect, reciprocity is the outcome of two parties' mutual exchanges. However, reciprocity does not arise from mere exchange. Reciprocity comes about because one party (B) *makes a return* to its counterpart (A) for a received benefit. Thus reciprocity presupposes that the mutual exchanges are contingent upon one another: B's return to A is a response to A's prior contribution to B. This point is crucial. If the mutual exchanges are not contingent upon one another, the mutual relationship is not reciprocal. When an act is returned, the recipient (or beneficiary) becomes a benefactor and the initial benefactor becomes a recipient.

The fact that reciprocity is the result of something being returned suggests that reciprocal relationships cannot involve more than two parties: A return must be directed towards the initial benefactor to be a return. The possibility that reciprocal relationships involve more than two individuals should not be ruled out, however. If the recipient (B) is unable to make a return, a third actor (C) may enter the relationship and make a return to the benefactor (A) on behalf of B. A recipient (B) might also direct a return towards another actor (C) than the benefactor (A) if C acts on behalf of A. I will now turn from this brief account of the phenomenon of reciprocity to the normative aspects of the concept.

### 5.1.1 The norm of reciprocity and the moral requirement to reciprocate

It is argued that there exists a universal norm of reciprocity. The sociologist Alvin Gouldner (1960: 171) asserts that the norm of reciprocity is to be found in all ‘value systems’. Lawrence Becker, in his philosophical account of reciprocity, claims that ‘in all societies of record, there is apparently a norm of reciprocity’ (1986: 81). The assertion that there exists a universal norm of reciprocity, seems to connote two rather different assumptions.

The first assumption concerns people’s moral sense and practice. In general, people have a moral sense of repaying benefits: ‘Ethnographers, social anthropologists, historians and sociologists report in unison that people everywhere do “feel” [an obligation to repay]’ (Becker 1986: 73). Apparently, people’s sense of obligation actually affects their behaviour: According to Becker (1986: 80), the empirical evidence of a norm of reciprocity is overwhelming. However, people’s ‘reciprocal behaviour’ differs from one society or culture to another (Becker 1986: 81; Gouldner 1960: 171). People have different ways of reciprocating and their sense of obligation varies.

The other assumption – and of importance in this context – concerns the existence of a moral duty. Linked to the norm of reciprocity is a demand that we *should* repay benefits. Being universal, this moral requirement applies to everyone.<sup>44</sup> Becker (1986: 89) formulates the moral requirement to reciprocate as follows: ‘Good received should be returned with good’.<sup>45</sup> This demand connotes several difficult moral questions, and I will raise the questions one by one in the following sections.

In the following, the moral requirement to reciprocate should be understood in light of what John Simmons (1979) calls natural moral bonds (or natural duties). Natural duties are moral bonds that apply to everybody irrespective of status or of acts performed and they are owed by all persons to all others (Simmons 1979: 13–14). It is common to make a distinction between natural moral bonds and specific moral bonds.

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<sup>44</sup> Neither Becker nor Gouldner explicitly say that there is a moral requirement linked to the norm of reciprocity. However, they do assert that such a requirement exists: They say that the norm of reciprocity is universal *in a generic form* (Becker 1986: 81; Gouldner 1960: 171). That is, although the norm of reciprocity is put to practise differently in different societies, there exists a (generic) norm that applies to everyone.

<sup>45</sup> The moral requirement to reciprocate appears in other formulations as well, and I return to one of them below. Alvin Gouldner’s (1960: 171) formulation of the moral requirement to reciprocate is different than Becker’s. However, he does not explore its justification. For this reason I will adhere to Becker’s formulation and account.

The latter are moral requirements that are generated by the performance of some voluntary act or omission (Simmons 1979: 14), and I will say more about such moral bonds in sections 5.2.1 and 5.2.2.

The assumption that the norm of reciprocity connotes a moral imperative, and that it is not only a proof of an attitude and a practice, is important: No matter how substantial the empirical evidence of people's sense of obligation to reciprocate and of their actual reciprocal behaviour might be, it does not justify the moral requirement itself. It might be that people's tendency to make return of benefits is but evidence of their politeness. Likewise, their sense of moral obligation might be grounded in false beliefs about moral bonds. For these reasons, I will in the following sections dwell with the assumption that we are morally required to return good for good received. I will therefore explore possible justifications for the moral requirement to reciprocate and determine to which extent – if at all – one must make returns for the good that we receive.

### 5.1.2 Possible justifications for the moral requirement to reciprocate

What makes an individual morally required to return good for good received? In this section, I am going to explore three possible justifications for the moral requirement to reciprocate. Reciprocity is justified on the grounds of having both instrumental and immanent value.

One justification for the duty to return good for good received is that reciprocity is an instrumental necessity in our lives (Becker 1986: 90–91). In becoming what we want to be, we need other people's help. Every day, from birth to death, we live on and advance because other people are thoughtful, support and help us. We are dependent on other persons to a great extent, and we cannot develop – perhaps not even survive – without the benefits that other people bestow us. We are much more likely to receive the necessary help from others if we make returns for the things we receive. There is reason to repay the help or good received, then, because reciprocation reinforces helping behaviour.

That it is beneficial to repay benefits does not necessarily justify it being a moral obligation, however. To reciprocate because it contributes to other people's



helping behaviour, implies that other people become means in one's own goal seeking. Moral duties, however, appear more properly moral when they do not entirely rely on self-fulfilling strategies. Can reciprocity be justified on the grounds of *other* people's welfare?

The moral requirement to return good for good could be justified because it promotes equilibrium. Reciprocity brings about social equilibrium in two ways: First, because two parties – and not just one – make an effort or a sacrifice. Second, because both parties benefit from each others' efforts. This argument appears self-evident, but that does not deprive it from being important. In the extreme, the lack of equilibrium between two parties can threaten one party's existence. Hence, social equilibrium protects against abusive behaviour and exploitation. In short, equilibrium fosters sound relationships between human beings.

Becker (1986: 82, 132) explains that the moral requirement to reciprocate is justified because equilibrium is a so-called primary good. That is, we acquire this particular primary good by reciprocating. Primary goods are vital because they are 'a state or object or disposition that is necessary (logically, physically, or psychologically) to the conduct of rational agents as such – that is, to deliberation and choice, or to goal satisfaction *per se* [...]' (Becker 1986: 81). To put it in simpler words, primary goods are necessary for the conduct of human life.

In this perspective, to reciprocate appears once again as an instrumental necessity: Equilibrium is necessary to achieve and maintain sound social relationships, and we achieve equilibrium by reciprocating. Arguments about sound social relationships, as opposed to the above-mentioned argument, are not (only) grounded on notions of self-fulfilment, however. Equilibrium is necessary to ensure other people's well-being as well as our own. Hence, the equilibrium explanation appears better founded.

A third justification for the duty to return good for good received could be that of doing good *per se*. We should repay the good that we receive not because it promotes our own welfare, neither because it promotes social equilibrium, but simply because we should return other people's good deeds. This justification is intuitively appealing: There is something morally attractive about returning good simply for the

sake of doing good. The justification, however, is also difficult to rationalise. What follows now is an attempt.

In order to identify the grounds for this moral justification, I would like to start with some brief remarks about virtue ethics, which I find central to the picture. In virtue ethics, the source of morality is not ‘external’ moral bonds (that we often tend to think in terms of), but rather the inner life and the character of the individual. Virtue ethics does not see moral life as a matter of relating properly to rules but is rather concerned with the virtuous (moral) individual and ‘inner traits, dispositions and motives that qualify the person as being virtuous’ (Slote 1997: 177). Virtue ethics is generally said to be agent-focused rather than action-focused: Of importance is *who* the person should *be* to be a moral person rather than *what* a moral person should *do* to act morally. However, *being* and *acting* is of course connected: I *am* not a moral person if I do not *behave* as one.

In a virtue ethical perspective, we should reciprocate because it is virtuous to reciprocate. In the terminology of virtue ethics, then, one should be *disposed* to return good for good (Becker 1986: 90–92, 125, 172).<sup>46</sup> To succeed as moral agents, we must take a certain attitude towards the receipt of benefits: We must be inclined to reciprocate. Why should we be disposed for reciprocation? According to Becker (1986: 80), reciprocity is justified because it is an ideal. But in the same breath, he says that reciprocity is an ideal *because* it entails helping behaviour and equilibrium. In referring to these reasons for reciprocity being an ideal, it seems that Becker loses sight of the ideal itself. It seems he argues in favour of reciprocity being an instrumental value, and not a goal *per se*.

What does it mean that reciprocity is an ideal? In what sense is it virtuous to reciprocate? Among the forms of virtue ethics that are least radical, the virtuous individual is someone who, without relying on rules, is sensitive and intelligent enough to perceive the noble as it varies from circumstance to circumstance (Slote 1997: 178), and act accordingly. In this perspective, to return good for good is noble because the action itself is noble. To reciprocate bears evidence of a sensitive

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<sup>46</sup> This is the other formulation of the moral requirement to reciprocate that I referred to above.

character, but the grounds for one's actions are subordinate. What counts is the noble action itself.

More radical forms of virtue ethics, however, would say that the ethical character of actions is not so independent of how and why the actions are done. Rather, the evaluation of actions is derivative from and dependent on what we have to say ethically about the inner life of the agents who perform these actions (Slote 1997: 178). Accordingly, it is noble, good and admirable to return good for good if the actor's *motives* are noble. A noble motive could be that one wishes other people well.

In certain circumstances, it seems right that the excellence of a return depends upon the motives that gave rise to it: Certain motives can be so ethically problematic that they infect that action itself. Nevertheless, I incline to say that as long as someone makes a return for a received benefit because he or she perceives such an act as something that ought to be carried through, the act is noble and admirable. There is also something noble about having the perceptiveness to know when it is appropriate to reciprocate. This takes me to the conclusion that reciprocity can be justified because the nobleness of returning good for good *per se* – whether it is because our motives are noble or because the action itself is noble – implies that we should be disposed for reciprocation.

This section has explored three justifications for the moral requirement to reciprocate. Upon examination, the latter one – that we should reciprocate because it is an ideal – appears the best founded.

### 5.1.3 Returning good for good received

As already mentioned, the principle of reciprocity requires that one returns good for good received: One must make returns for the good that one receives, and what one returns must be good. What does this actually mean? *Webster's Dictionary* (1989) gives 49 different definitions of the word 'good'. Good can be used both as an adjective and as a noun. Here, the word 'good' will be used in both senses: As a noun, meaning for example excellence or kindness, as in 'to do good', and as an adjective, meaning for example kind, beneficent or friendly, as 'to do a good deed' or healthful

or beneficial, as in ‘fresh fruit is good for you’. I will deal with *receiving good* in this section; i.e. what we must make returns for.

Good is most often thought of as something that is valued or appreciated. The valued or appreciated is thus good because it means something to us: It contributes to our welfare or enriches our lives. However, whether something is valued or not will depend upon the recipient: It is given by the recipient’s needs and interests. Accordingly, something of great value to me may be valueless to someone else, and vice versa. Sunny, calm weather, for example, has great value for those who take Easter holiday and leave for the mountains, but it can be valueless (and even painful) for those who have to work long days. What I perceive as good, then, is not necessarily good for someone else. This is the subjective side of the concept good, but there seems to be an objective side to the concept as well: Fresh fruit, doctors claim, is indeed good to anyone. Hence, no matter whether one likes fruit or not, it is ‘good’. This seems to imply that one should make returns for benefits that, objectively, are good even though the benefit is not really appreciated.

Alvin Gouldner asserts that the *value* of the received is constitutive for the existence of a moral requirement to reciprocate. He explains that the moral requirement to reciprocate

imposes obligations only contingently, that is, in response to the benefits conferred by others. Moreover, such obligations of repayment are contingent upon the imputed *value* of the benefit received. The benefit and hence the debt is in proportion to and varies with – among other things – the intensity of the recipients’ need at the time the benefit was bestowed [...] (1960: 171).

The greater the recipient’s need, the greater the value of the benefit will be. If the received has value to the person who receives it, the moral requirement to reciprocate arises. The antithetical facet to Gouldner’s point is the following: If the received is not valuable to the recipient, he or she will not be required to reciprocate. Is Gouldner right in assuming that a person is not required to reciprocate if the received is not valuable? I believe that there is more to the question of what good is.

Consider the following example: An acquaintance of my family calls me and invites me for dinner. Although I am very tired, I accept the invitation for the sake of politeness. If I return home in a good mood after a nice meal and pleasant company, it

means that I appreciated visiting my acquaintance. Hence, it represents a good according to the definition above (and I am morally required to reciprocate). What if I return home hungry and angry? What if the food I was offered, as well as the company, was off-putting? In that case, there is no doubt that going there was valueless to me. Accordingly, I am not morally required to reciprocate according to the definition above. The logic, it seems, is that there is nothing to make returns for.

Let us assume that my acquaintance actually did everything she could to please me, but was unfortunate while cooking. Failing in the kitchen put her in a terrible mood. She could not help it as she takes pride in cooking. However, I was invited with her best intentions. Nonetheless, there is no doubt that to me, the visit ended rather unpleasantly. In this case, my being morally required to reciprocate or not seems to depend upon my acquaintance's success in the kitchen.

There might be reason to let people's intentions have a say, however. As mentioned in the previous section, virtue ethics is concerned with character and the dispositions and motives that qualify someone to be virtuous. Whether the recipient chooses to respond or not, in a situation as the one sketched above, tells us something about his or her character: Not making a return would be ignoring the other person's good intentions, which bears evidence of an insensitive character. A moral or a virtuous person, however, might in a given situation observe that reciprocation is right because not reciprocating could make the other person feel worse. Consequently, in defining the kinds of things that we should make returns for, there might be reason to include people's good intentions, although the actual *outcomes* of their intentions – their actions – are not valuable to us.

#### 5.1.4 Implications of the moral requirement to return good for good

The moral requirement to reciprocate demands, as previously mentioned, that we should return good for good received or that we should be disposed to reciprocate. I would now like to test the validity of the moral requirement to reciprocate by examining its implications. To what extent must we return good for good received?

I will take the latter formulation of the moral requirement to reciprocate – that we should be *disposed* to reciprocate – as my starting point. This formulation of the

requirement expresses that we should reciprocate for the sake of doing good itself, which upon examination in section 5.1.2 proved the best justification. As noted above, being disposed to reciprocate is a demand to take a certain attitude towards the receipt of benefits. To succeed as moral agents, we must perceive repayment of benefits as a moral commitment, no matter how the benefit came about.

To be disposed for reciprocation means that the moral agent, in principle, must make returns for *whatever* good he or she receives. All situations will be equal in a moral sense because such a disposition implies that the moral agent cannot differentiate between situations in which he or she receives benefits. Accordingly, what the received is, from whom we received it or why it was given to us is insignificant in a moral sense since *every* good received should be returned. Moreover, own role in receiving a benefit is also unimportant: To be disposed to reciprocate implies that we should make returns for good *received*, ‘not only for the good we solicit and not only for the good we explicitly accept’<sup>47</sup> (Becker 1986: 124). Among the mentioned implications, I believe that the last one – that our own role in receiving benefits is unimportant – gives rise to the most controversial and difficult moral questions. For this reason, I will now carefully investigate the significance of one’s own role in receiving benefits for the duty to reciprocate.

Consider the following example of *mere receipt* of benefits: My friend and I have decided to ascend Visbretind, one of Jotunheimen’s highest and most spectacular peaks. Half way to the peak, we decide to make a pause. We take off our rucksacks and sit down. While I am enjoying my sandwiches and the view, my friend takes all the things I am carrying and puts them in his rucksack, on his own initiative. He starts to walk before I realise what is going on, and it is too late to stop him. I have no possibility to catch up with him, and he reaches the peak before I reach him. Reaching the peak myself, I am very happy that I was released from my heavy rucksack. Thus, what my friend did was valuable to me. I was given a benefit.

In this situation, I was entirely passive: I was given the benefit only because my friend decided to carry my things. I might have wished for the benefit (and I might

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<sup>47</sup> I will treat the issue of accepting benefits in more detail in section 5.2.3.

not), but it is clear that I did not do anything to get the benefit. It should be noted, however, that not only was I passive in this situation. Receiving the benefit was also out of my control. That is, not only did I do nothing to receive it: As it was, I could not avoid getting it.

There is no doubt that it would be nice if I in some way or other made a return for the received benefit. It would make my friend happy, and it would make me feel better. According to the requirement to reciprocate as formulated above, however, I am actually morally *required* to make a return in this situation. The mere receipt of a benefit makes me required to reciprocate because not reciprocating in some way or other would be contrary of pursuing the ideal.

Likewise, I should in principle repay the post card that I recently received from my friends on holiday in the Seychelles since receiving their news made me happy. The same goes for the long-wanted book that my mother suddenly decided to give me. I should also repay the street lightning in Oslo since I am scared of the dark. When thinking about it, the list of benefits that one receives from others becomes overwhelming. We receive benefits every day, and many of the benefits that we receive cannot be avoided. Since we generally should repay every benefit received, we will be constantly and ceaselessly indebted. There seems to be overwhelming burdens associated with the moral requirement to reciprocate.

Lawrence Becker acknowledges that

resources are scarce, and time and energy are limited. Reciprocating for *every* good received may well be impossible [...]. It might be self-defeating, in the sense that it would compromise the very efforts at further social intercourse that reciprocity is supposed to promote (1986: 91).

When, then, should we actually reciprocate, and when may we let it be? What other pressing demands may override the requirement to return good for good received? Becker has no confidence in a precise general answer (1986: 91). Whether one should make a return for a benefit received or not will have to be worked out case by case. To reciprocate, hence, is a *prima facie* duty.

I would like to consider another important implication of the moral requirement to reciprocate as well. As opposed to the mentioned implication, which is linked to the overwhelming burdens that follow from the moral requirement, this implication is

rationally, rather than practically, problematic. As noted above, we should make returns for whatever good we receive, also for benefits that we have not asked for or even wanted. This implies that our moral bonds will depend upon what other people happen to do to us. Should someone thrust a benefit upon us we should, in principle, make a return. We become required to make returns, then, because of other people's whims and benefactions. No matter how well founded the virtue ethical justification for reciprocity appears, there is something disturbing about the fact that we must reciprocate just because someone happens to be good to us.

I have now unearthed some disturbing consequences of a strict moral duty to reciprocate. What is actually disturbing about them? I believe that the answer is linked to the important notion of autonomy. We are in no way responsible for receiving all benefits, and being required to reciprocate for benefits that cannot be avoided threatens our autonomy. In this sense, the moral requirement to reciprocate makes us *vulnerable*. To be sure, we do not enjoy entire freedom as moral agents. Moral requirements do indeed restrict our freedom. Anyhow, we have to accept the vulnerability that moral requirements represent. But the moral requirement to reciprocate makes us vulnerable towards people who happen to bestow us benefits; a vulnerability that cannot so easily be accepted.

The purpose of the next section is to consolidate the justification for reciprocity being an ideal, for which I concluded there is a strong case, and the important notion of autonomy.

## 5.2 The moral requirement to reciprocate reformulated

In dealing with the problematic implications of the moral requirement to reciprocate, as it was formulated in the previous section, the aim must be to narrow the requirement's scope so that it does not challenge the notion of autonomy. I will attempt at reformulating the moral requirement to reciprocate by starting to account for a moral tradition which sees moral requirements not as duties that apply to us independently of our actions, but as obligations that apply to us *in virtue of* our actions: The consent tradition.



### 5.2.1 The consent tradition: moral bonds as voluntary and deliberate undertakings

According to the consent tradition, our moral bonds (obligations) come into existence because we *voluntarily undertake* them. While nature duties are owed by all persons to all others, obligations are owed by a specific person (the obligor) to a specific person or persons (the obligee(s)). Promises, written contracts and authorisations of the actions of others are generally held to be acts of consent. They are acts of consent because they are both voluntary *and* explicit statements. Hence, to undertake an obligation requires the performance of a *deliberate* act: An individual cannot become obligated unless he or she *intentionally* performs an obligation-generating act with a clear understanding of its significance (Simmons 1979: 64). This assertion relies on the notion that man is naturally free, and that man gives up his natural freedom (and is bound by moral obligation) only by voluntarily giving a ‘clear sign’ that he desires to do so (Simmons 1979: 62–65). Since consent is explicitly stated, the content of an obligation is determined by determining what the obligor actually has promised or agreed to.

Why does consent generate an obligation? The answer must be that the obligor, by consenting, gives the obligee reason to believe that he or she can expect a certain performance from the obligor. In promising my father that I will take care of my 13-year-old sister when she arrives at the airport, I give him reason to expect that I will actually do so. As a source of moral obligation, consent protects the obligee’s expectations: I will be held morally responsible for not fulfilling my promise towards my father. There is reason to hold an obligor responsible for obligation-generating acts because such acts are *voluntary*. Hence, the obligee’s expectations are to count for more than the obligor’s unwillingness to fulfil what is agreed or promised to.

In a consent perspective, one is not required to make returns for benefits unless one deliberately and explicitly has stated to do so. An act’s being morally acceptable or even praiseworthy cannot make the act *obligatory*. Accordingly, a person is only required to reciprocate if he or she has undertaken such an obligation. This implies that the consent tradition does not, as opposed to the moral requirement to reciprocate, threaten the notion of autonomy. On the contrary, the approach seems to go too far in protecting the individual’s autonomy and it therefore fails to account for those

requirements that apply to us as moral agents<sup>48</sup>. This will be demonstrated by way of example.

Suppose the United States decides to share an intelligence novelty with its NATO allies. As the new technology is economical to produce, all members of the alliance decide to make use of the invention to upgrade their intelligence systems. Each country develops and makes use of the know-how provided by the United States. A few weeks later, France decides to share a logistics system novelty. This invention also proves useful to the other NATO members. They all benefit by reorganising their logistical systems. One by one, the ally members decide to share new valuable know-how with the other members. This goes on until Norway is the only country that has not contributed. While the other NATO members willingly have shared military inventions with the others, the Norwegian government decides not to, on the grounds that Norway has never consented to share new technology with its allies. Quite so, the North Atlantic Treaty does not establish that military inventions must be shared among the member states. In other words, none of the allies have explicitly stated their support of sharing new technology with the others. In a consent perspective, therefore, Norway is not obligated to share its own technological devices with the other members. Nonetheless, there is no doubt that if Norway chooses not to make some kind of return for received benefits, we will consider Norway's action morally unacceptable. For what reasons should Norway be required to make returns for received benefits?

The sharing of military technology could be understood as a practice or a custom that has gradually developed, making all states required to contribute. It could be argued that the practice represents an additional set of rules, existing beside the formal agreements already signed by the member states. It appears that the more countries that share technological novelties, the more the custom is set. Being the only country that has not contributed, therefore, one could argue that Norway should assume responsibility by contributing.

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<sup>48</sup> The same observation was made in section 3.2 when I accounted for international law and consent theory.

In this case, however, the number of countries adhering to the new practice is not morally significant. If we presume that Norway is required to share one of its inventions just because all its allies have decided to do so, Norway's autonomy will be threatened. This was raised as a significant objection against the moral requirement to reciprocate in section 5.1.4.

It could also be argued that Norway's obligation to contribute rests on the expectations of Norway's allies. By benefiting from the other members' efforts, Norway might lead its allies to expect certain future performances from Norway. However, simply benefiting from the other members' inventions does not give the other allies the same reason to expect something from Norway as consent would as, Norway has not explicitly stated that it will share its military know-how. On this view, there is not a strong case for the expectations that Norway's allies might have. This conclusion and the previous one suggest that neither the *expectations* nor the *actions* of Norway's allies can impose a duty on Norway to make returns for received benefits. Instead, the grounds for Norway's obligation to carry its fair share should be sought in Norway's *own actions*. The *principle of fair play*, which I will account for in the following section, suggests that Norway is obligated to make returns for benefits because it is *fair* that Norway does so.

### 5.2.2 The principle of fair play

In this section I will account for the principle of fair play as H. L. A. Hart (1955), John Rawls (1964/99) and John Simmons (1979) has expounded it in order to assess whether this approach can be used to consolidate the moral requirement to reciprocate and the notion of autonomy. H. L. A. Hart accounts for the principle of fair play in the following way:

[W]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. [...] [T]he moral obligation to obey the rules in such circumstances is due to the cooperating members of the society, and they have the correlative right to obedience. (1955: 185)

In the case of mutual restrictions we are in fact saying that this claim to interfere with another's freedom is justified because it is fair. (1955: 190–191)

Hart's assertion is that a beneficiary (B) of co-operation has an obligation to do his or her fair share by submitting to the restrictions of a scheme because the others (X, Y, Z) have a right to B's co-operation. Because X, Y and Z have previously submitted to the scheme's restrictions, it is fair that B does so as well. The reason for this – a reason that Hart does not explicitly mention – must be that B has *benefited* from X, Y and Z submitting to the scheme's restrictions. Not co-operating is to deprive X, Y and Z from benefits that B has already enjoyed. Hence, not submitting to the scheme's restrictions would be to take unfair advantage of the others. Since the principle of fair play establishes that B must co-operate, the principle of fair play actually requires B, a beneficiary, to make returns for received benefits. We can see, therefore, that the principle of fair play makes the same kind of demand as the principle of reciprocity: To make returns for received benefits.<sup>49</sup> The justification for this must be that one by making returns, or doing one's fair share, does not take unfair advantage of the others.

An individual becomes obligated by the principle of fair play not by explicitly demonstrating that he or she is aware of the moral significance receiving the benefits. Thus, obligations of fair play, as opposed to consent as a source of moral obligation, need not be *deliberately* incurred.<sup>50</sup>

It is important to note that Hart (1955) asserts that the principle of fair play applies to 'joint enterprises' governed by 'rules'. This implies that the scope of the principle of fair play is more limited than that of the moral requirement to reciprocate. In the following, I am going to investigate the scope of the principle of fair play in some more detail. Does an obligation of fair play arise simply by entering a scheme of co-operation? That is, is it enough to be a member of a scheme to be required to make returns for the benefits that the scheme yields?

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<sup>49</sup> An important difference between the two principles lies in the context within which they are discussed: While Hart (1955) and Rawls (1964/99) discuss the principle of fair play in the context of schemes of co-operation, Becker (1986) and Gouldner (1960) discuss the principle of reciprocity in the context of mutual relations.

<sup>50</sup> When I discussed the justification for states' obligation to adhere to rules of international law in section 3.2, I concluded that consent theory does not give a full account of this obligation since it is assumed that new states become bound by existing rules of international law. The principle of reciprocity and the principle of fair play, however, are possible justifications: If new states benefit from other states' adherence to rules of international law, they should make returns in the form of adherence to the same rules. As will be demonstrated in the next section, however, only participants of a scheme of co-operations should be required to make returns. This raises the question of whether new states can be said to be participants. I will not attempt at answering this question here and will rest satisfied with the justification presented in chapter 3. Since the UN Charter has not been replaced by a customary international rule and Norway has ratified this charter, consent theory gives a full account of Norway's obligation to respect the Charter provisions.

For the purpose of more precisely assessing how and to what extent the principle of fair play yields an account of obligation, I shall start by asking why Hart considers a set of rules governing the co-operative scheme as significant for an obligation of fair play to exist. Does Hart mean to say that the principle of fair play does not apply to non-rule-governed undertakings? Recall the previous example of the sharing of military devices. Why would the North Atlantic Treaty be necessary for Norway to be morally required to make returns for received benefits? Would Norway be any less required to make returns to its allies if the co-operation was not established by a treaty? As John Simmons (1979: 105) observes, there does not seem to be any reason why rules governing an enterprise are necessary for the principle of fair play to apply. Not making returns would be equally unfair whether there are rules governing the enterprise or not. Each participant ought to do ‘his part’ in the scheme, even if that ‘part’ is not clearly defined by rules (Simmons 1979: 105). This is to say that even if the co-operation is not governed by rules, the participants should make returns for received benefits. We may reasonably conclude, therefore, that the principle of fair play applies to both rule-governed and non-rule-governed undertakings.<sup>51</sup>

We must suppose that Hart, by saying that the principle of fair play applies to joint enterprises conducted ‘according to rules’, meant to limit the principle’s scope to veritable undertakings: The principle is only to apply to individuals who participate in a scheme of co-operation. This is a crucial point. If the principle of fair play were to obligate *anyone* who simply benefits from a scheme, it would threaten the autonomy of non-participants. Employees who have chosen not to be organised in a trade union because they disagree with its chosen issues, for example, should not have to reciprocate even if they get the advantages that the work of the trade union gives.

Hence, it is necessary to distinguish non-participants (or outsiders) from participants (or insiders). How, exactly, must an individual be involved in a scheme to be characterised as a participant, and thus bound by the principle of fair play? Is it enough to be a *member* of an identifiable group? The question of what kind of

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<sup>51</sup> Note that there can be at least two kinds of ‘rules’: (i) Rules governing (or establishing) the enterprise itself and (ii) rules amplifying what the members must contribute. Neither the first nor the second kinds of rules are necessary for an obligation of fair play to arise.

relationship there must be between an individual and a co-operative scheme for someone to be said to be a participant, and thus bound by the principle of fair play, is tricky. Simmons (1979: 123) notes that one would normally say that an individual is involved in a scheme if he or she has

- (i) pledged his or her support to the scheme, or tacitly agreed<sup>52</sup> to be governed by the scheme's rules, or
- (ii) played some active role in the scheme after its institution.

(i) implies that membership itself imposes an obligation of fair play. (ii) implies that an individual also can become obligated by the principle of fair play by playing an active role in the scheme. I will most likely be considered a participant of a reading circle if I start turning up at its meetings and take part in the discussions, even if I have not explicitly declared that I intend to be a member of the group. Thus according to the general view, to fulfil one of the two criteria is sufficient: I do not have to pledge my support to a scheme in addition to playing an active role in it, and vice versa, to be considered a participant.

If it is enough to be regarded as a participant by pledging one's support to the scheme, it could be argued that the principle of fair play is superfluous (Simmons 1979: 124): If the principle of fair play only binds participants, it will bind only those individuals who are *already* obligated to do their part in the scheme because they have consented to it. The principle of fair play does enjoy an individual justification, however: As noted above, the principle obliges a member of a scheme to make returns to avoid taking unfair advantage of the other members. It requires that a member to make returns because it has *benefited* as a member. However, a member does not take unfair advantage of the others if it does not make returns for benefits that have not been received. Hence, an individual is not required to make returns for benefits that have not actually been received. This implies that it is not sufficient to pledge one's support to a scheme to be bound by the principle of fair play.

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<sup>52</sup> The issue of tacit consent raises difficult questions. In brief, tacit consent means that consent is given by remaining silent or inactive; it is expressed by the failure of doing certain things (Simmons 1979: 80). As I have not been concerned with this issue previously and as I will not return to it later, I will not dwell with it here.

This section has demonstrated that an individual who simply benefits from a scheme of co-operation, without being a member, does not become obligated under the principle of fair play. It has also been demonstrated that membership in a co-operative scheme is not sufficient to generate an obligation of fair play, as membership does not necessarily yield benefits. The principle applies, however, when membership in a scheme of co-operation is beneficial. These conclusions suggest that the tricky implications of the moral requirement to reciprocate and the unsatisfactory account of consent theory have been compromised: The principle of fair play complies with the important notion of autonomy without presupposing that the beneficiary must have given a clear sign of his or her willingness to make returns for received benefits.

Although these conclusions have been reached, it remains to more precisely assess the scope of the principle of fair play. What is the significance of the way in which the benefits are received within the scheme of co-operation? Does a member become obligated to make returns for benefits that cannot be avoided? I will explore these questions in the next, and last, section of this chapter.

### 5.2.3 Receiving benefits within a scheme of co-operation

Membership in a co-operative scheme, I concluded in the previous section, does not itself generate an obligation of reciprocity. However, such an obligation can arise if the membership is beneficial. Are members of co-operative schemes obligated to make returns for all benefits, no matter how they are received? Or must the benefits be received in certain ways? If we assume that a beneficial membership is enough to generate an obligation to make returns, this implies that the way in which the benefits are received is normatively insignificant. One reason why the moral requirement to reciprocate was rejected in section 5.1.4, was that a requirement to make returns for benefits that are merely received or unavoidable threaten the beneficiary's autonomy. This raises the question of benefits that are merely received or unavoidable within a scheme of co-operation generate an obligation to make returns. While one cannot hold the beneficiary responsible for receiving the benefit *per se*, one can certainly hold the beneficiary responsible for being a member of the scheme. This suggests that the beneficiary is indirectly responsible for receiving the benefit.

John Rawls (1964/99), as H. L. A. Hart (1955), asserts that the principle of fair play only applies to veritable undertakings. As opposed to Hart, however, Rawls (1964/99: 122) does not consider membership as a sufficient condition for one's being obligated to make returns for received benefits:

The principle of fair play may be defined as follows. Suppose there is a mutually beneficial and just scheme of cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person *who has accepted the benefits of the scheme* is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating. (1964/99: 122, italics added).

What Rawls suggests, is that only those members who have *accepted the benefits* of a scheme are bound by the principle of fair play. Rawls, in other words, does not see mere benefaction within a co-operative scheme as sufficient to generate an obligation of fair play. What does Rawls mean when he says that members have to have accepted benefits to be required to make returns? Does acceptance presuppose an action or a statement, or is it possible to accept benefits that are merely received? Although Rawls insists on acceptance, he does not explain what it means to accept benefits. It is reasonable to assume, however, that a person who has tried to avoid getting a benefit cannot be said to have accepted it (Simmons 1979: 129). This suggests that members of co-operative schemes who have tried to avoid getting the benefits of co-operation, but nevertheless received them, cannot be required to make returns for them.

John Simmons (1979: 129), in elaborating the notion of accepting benefits, suggests that an individual, to have accepted a benefit, must either

- (i) have tried to get (and succeed in getting)<sup>53</sup> the benefit or
- (ii) have taken the benefit willingly and knowingly.

Thus according to Simmons, to determine whether a person has accepted a benefit, one should consider both the beneficiary's *actions* and *attitude towards* the benefits. (i) refers to the actions; to cases when the benefits are only available to the members, and they have to do something to get the benefits. As demonstrated above, when a

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<sup>53</sup> As established above, we are not required to make returns for benefits that we have not received.



beneficiary is himself or herself responsible for receiving a benefit in this way, it would be unfair not to co-operate by doing one's share. In the example of the sharing of technological devices within NATO, it was shown that Norway actually had to develop the know-how developed by the other NATO members and that Norway thus was responsible for having received these benefits. In this case, Norway's own actions have generated an obligation to make returns.

(ii) refers to the attitude. In cases when a benefit is merely received, and the beneficiary himself or herself is not responsible for receiving the benefit, there can be little doubt that he or she may take the benefit willingly and knowingly. That is, the beneficiary can both want the benefit and be aware of the fact that he or she receives it, although he or she does not have to do something to get the benefit. Hence, acceptance does not presuppose an action or a statement.

For what reasons does Simmons consider the beneficiary receiving the benefits willingly and knowingly as morally significant? Fair play considerations, as demonstrated in section 5.2.2, are justified because we ought not to take unfair advantage of others. While a beneficiary who is not aware of receiving benefits (or who has not wanted the benefits at all) can hardly be said to take unfair advantage of the others by not making returns, a beneficiary who willingly and knowingly benefits from other people's efforts without repaying can certainly be said to do so. This implies that to merely receive benefits within a scheme of co-operation does not necessarily imply that the beneficiary is morally required to make returns. Of importance is the beneficiary's knowledge of and attitude towards the benefits.

In establishing that a beneficiary is required to make returns not only for benefits that the beneficiary in some way or other is responsible for receiving, but also for benefits that are willingly and knowingly received, the moral requirement to reciprocate as now reformulated does not seem to threaten the beneficiary's autonomy, while at the same time preventing that a beneficiary takes unfair advantage of others.

### 5.3 Conclusion

This chapter started by exploring the principle of reciprocity as it has been spelled out in philosophy and in sociology and investigating possible justifications for the principle. Among these justifications, the one saying that one should reciprocate for the sake of doing good itself appeared the best founded. Having demonstrated that the implications of the natural duty to reciprocate conflict with the important notion of autonomy, I attempted to reformulate the principle. The account of the consent tradition demonstrated that while this tradition is highly attentive to autonomy considerations, it does not fully account for the obligations that actually apply to moral agents. I then explored the principle of fair play and demonstrated that this principle makes the same kind of demand as the principle of reciprocity. However, its scope is narrower: The principle only applies to *participants* in veritable undertakings. Moreover, the participants are only required to make returns for benefits that they have had to do something to get hold of, or if the benefits are merely received, only if the benefits are received willingly and knowingly. The justification for this formulation of the principle of fair play – which is the principle of reciprocity reformulated –, it was demonstrated, is the consideration of not taking unfair advantage of others.

## 6 NORWAY, NATO AND THE MORAL REQUIREMENT TO RECIPROCATE

The purpose of this chapter is to assess whether Norway is bound by moral obligation to participate in NATO out-of-area operations that lack Security Council authorisation. While chapter 4 concluded that burden-sharing principles do not establish whether Norway is obligated towards NATO to participate in this kind of military operations, the previous chapter implies that Norway can be bound by a moral obligation of reciprocity towards NATO to participate. If such an obligation exists, it seems to be because the benefits that Norway has received as a NATO member has generated an obligation to make returns in the form of participation in the mentioned kind of operations.

The North Atlantic Treaty, as explained in section 1.2.3, was grounded for the purpose of collective defence. The Treaty entails benefits but also imposes obligations on NATO's member states. While collective defence remains one of NATO's purposes, NATO has undertaken new roles *beyond* the collective defence to enhance the member states' security in the post-Cold War era. As noted in section 2.4.2, political declarations, investments, exercises and military operations after the Cold War demonstrate that the alliance has collective security aspirations. In determining whether Norway is obligated to make returns to NATO for received benefits, I will direct my attention to benefits that derive from NATO's post-Cold War approach to security and call these benefits '*benefits of collective security*'. The reason why I focus on the benefits of collective security is that they lack a contractual basis<sup>54</sup>, while the benefits of collective defence are established in the North Atlantic Treaty<sup>55</sup>. I will first examine whether Norway's membership in NATO has yielded benefits that generate an obligation to make returns. If so, how is an obligation of reciprocity fulfilled?

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<sup>54</sup> They are expressed in both political declarations and the strategic concepts, but the member states have not ratified any written document establishing an obligation to make contributions to achieve these benefits.

<sup>55</sup> As noted in section 2.4.2, Article 3 in the North Atlantic Treaty obliges every member state to 'to maintain and develop their individual and collective capacity to resist an armed attack'. Given their contractual basis, the principle of fair play will be superfluous for these benefits.

## 6.1 Is Norway obligated to make returns for received benefits?

Membership in a co-operative scheme, I concluded in section 5.2.2, does not itself generate an obligation of reciprocity. However, such an obligation can arise if the membership is beneficial. I explained that the justification for this is that not to make a return would be to take unfair advantage of the other members. These conclusions suggest that Norway is required to make returns to NATO only if the membership is beneficial. It is generally held that Norway's membership in NATO is beneficial because NATO guarantees Norway's security. Does this mean that Norway is bound by an obligation of reciprocity to make returns to NATO for received benefits? Is the fact that Norway receives benefits from NATO a sufficient reason to say that Norway is obligated to reciprocate?

The discussion of the principles of reciprocity and of fair play in the previous chapter suggests that Norway's actions and attitudes towards NATO benefits are decisive. If Norway has to take steps to receive the benefits of co-operation, Norway can be held responsible for receiving the benefits and will thus be obligated by the principle of fair play to make returns. If, however, the benefits are merely received, Norway cannot be held responsible for receiving the benefits *per se*. In that case, Norway's attitude towards the benefits will be decisive.

In economic theory, a distinction is made between *public* and *private* goods. This distinction will prove relevant to determining whether the principle of reciprocity imposes a duty on Norway. Military alliances have been characterised as sharing public goods. Defence is purely public if the benefits associated with defence are non-rival and non-excludable (Sandler & Hartley 1995: 29).<sup>56</sup> It is assumed that NATO's nuclear defence posture from 1949 to 1966 – the deterrence strategy of mutual assured destruction (MAD) – yielded non-excludable and non-rival benefits to members of the alliance (Sandler & Hartley 1999: 37–38). According to MAD, any Soviet territorial expansion affecting NATO territory would be met with a devastating nuclear attack.

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<sup>56</sup> A good is non-excludable if it is available to all once the good is provided and non-rival (or indivisible) if a member can consume a unit of the good without detracting from the consumption opportunities still available to the others (Sandler & Hartley 1995: 4).

Hence deterrence was non-rival as the ability to deter enemy aggression was independent of the number of allies on whose behalf the retaliatory threat was made. Moreover, the retaliatory threat was credible because Soviet nuclear forces were vulnerable to a pre-emptive strike until the mid-1960s, so that US nuclear forces could attack with impunity (Sandler & Hartely 1999: 38). Deterrence was also non-excludable because the US threat to retaliate on behalf of its European allies was credible and more or less automatic as the United States had little to fear from unleashing a pre-emptive strike (Sandler & Hartely 1999: 38). Important to the present discussion is the fact that public goods cannot easily be avoided. Security in the form of strategic deterrence is obtained upon membership itself. If the benefits of MAD were to be avoided, an ally would have to avoid NATO altogether.

In 1967, NATO adopted the doctrine of flexible response, which permitted NATO to respond in alternative ways to a Warsaw Pact challenge (Sandler & Hartley 1999: 38). This document and several other documents, adopted both during and after the Cold War, significantly reduced NATO's reliance on nuclear weapons. To fulfil the new strategic doctrines, NATO has strengthened its conventional forces. The reliance on conventional weapons means that a greater share of NATO's defence benefits is private<sup>57</sup> (or impurely public) (Sandler & Hartley 1999: 38). This means that the benefits are subject to consumption rivalry to a greater extent: The deployment of conventional forces for military operations in the Balkans, for example, implies less means to resist a potential Russian attack in Finnmark. Being subjected to consumption rivalry, one would assume that the members have to negotiate to *obtain* the benefits. There is an important conclusion to be drawn from this observation: If the benefits of NATO co-operation actually have to be obtained, there is reason to say that the allies are responsible for receiving the post-Cold War benefits themselves. This implies that the allies are morally required to make returns for these benefits.

Although the benefits of co-operation after the Cold War to a greater extent than earlier have the character of privateness, not all security benefits must be gained.

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<sup>57</sup> A pure private (or ally-specific) good possesses benefits that are excludable and rival. An excludable benefit is one that can be withheld costlessly by the provider, while a rival benefit is one that cannot be consumed without restricting the consumption opportunities available to the others (Sandler and Hartley 1995: 4).

Recall that NATO assumes that instabilities in its geographical rim represents a security threat to the alliance as a whole. Even though forces are deployed to an instable region, one must assume that – given NATO’s perception of threat – this is beneficial to the alliance as a whole. Hence, the possibility that membership in NATO still *automatically* yields the member states certain benefits should not be ruled out. This raises the question of whether Norway can be obligated to make returns for benefits that the country merely receives from NATO? Although Norway cannot be held responsible for receiving such benefits, the country might have accepted the benefits by *willingly* and *knowingly* receiving them. How can we know whether a benefit that is merely received is received willingly and knowingly? What kind of evidence is required to conclude that Norway has accepted benefits and thus is morally required to making returns?

It was noted in section 5.2.3 that a member who has tried to avoid getting a benefit cannot be said to have accepted it. Is it, however, necessary to have tried to avoid getting a benefit not to have accepted it? Although a member of scheme of co-operation has not tried to avoid getting a benefit, one cannot conclude that the member has taken the benefit willingly. NATO’s history demonstrates, however, how certain members have actively *made exemption from benefits* that the membership yields. France, for example, has never benefited from the co-operation in NATO’s Nuclear Planning Group, as the country has never participated in it (Yost 1999: 35). During the early and mid-1960s, Denmark attached several paragraphs to NATO communiqués dealing with intermediate-range nuclear forces (Yost 1998: 117). Although Denmark presumably enjoyed the benefits that these nuclear forces yielded, there is no doubt that the country opposed the benefits.

When it comes to Norway, there is no indication that the country has tried to avoid the benefits of NATO co-operation after the Cold War. The country has never questioned nor opposed the benefits that the co-operation yields. There is no reason to believe that Norway has not wanted the benefits of collective security; rather, Norway’s foreign policy tends to show that Norway consider these benefits valuable. This suggests that Norway takes the benefits of co-operation willingly and knowingly. By walking along with the alliance’s development in the post-Cold War era without

questioning any of the alliance benefits, Norway accepts the benefits that derive from the co-operation. As everything tends to show that Norway has taken the benefits of collective security willingly and knowingly, not to make returns for these benefits would be to take unfair advantage of the other ally members. For this reason, I will conclude that the moral principle of reciprocity imposes a duty on Norway to make returns for received benefits.

## 6.2 Fulfilling the obligation of reciprocity

How is an obligation of reciprocity fulfilled? While some moral principles give *specific* action guidance, others do not. The moral principles ‘keep your promises’ and ‘do not lie’ are examples of moral requirements that give specific action guidance. A moral agent, to fulfil the first obligation, needs to know what he or she has promised to do. The second obligation requires that he or she knows what is true. A moral principle of this kind establishes by *itself* the claim it has on someone’s actions. It takes the form of a precise command or prohibition, and thus only allows for what Charles Larmore calls ‘little leeway for individual moral judgement’ (1987: 5).<sup>58</sup>

The duty of reciprocity is a moral principle that does not give specific action guidance. The moral principle establishes, as demonstrated above, that Norway should make returns to NATO. However, the principle does not establish what actions Norway must carry out to fulfil the duty. This does not imply, however, that *any* given Norwegian response will fulfil the obligation. Since the principle’s justification is that a beneficiary should not take unfair advantage of others, some actions will certainly better satisfy the obligation than other actions. To know how to best fulfil the obligation – to know what the return in this specific case must be like – one must exercise moral judgment.<sup>59</sup> One must, as Larmore (1987: 6) explains, figure out which available course of action that best satisfies the obligation.

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<sup>58</sup> I discussed a moral principle of this kind in chapter 3, namely the moral principle that states are obligated to adhere to rules of international law. This principle *itself* establishes the claim it has on Norway’s actions: Norway must not resort to military force unless the country or one of its allies is subjected to an armed attack or if the Security Council has given authorisation to military operations.

<sup>59</sup> I will more to say of moral judgment in the next chapter.

### 6.2.1 Making fitting and proportional returns

I explained in section 5.1.1 that reciprocity comes into existence when something is *returned*. What kinds of actions qualify as *returns* from a moral point of view? The justification for the reformulated principle of reciprocity is that a beneficiary should not take unfair advantage of the benefactor(s). This justification will be considered when I account for how the duty of reciprocity is to be fulfilled.<sup>60</sup>

In the literature about reciprocity, one comes upon the assumption that actions, to be reciprocal, must be ‘correspondent’, ‘equivalent’ (Homans and Simmel expounded in Larson 1998: 129) or ‘commensurate’ (Becker 1986: 106). Strictly speaking, these words are not synonyms, but in speaking of reciprocity, they do refer to the same idea: An action, to qualify as a return in the moral sense of the word, must *meet* the received benefit. If the beneficiary makes a return that meets the received benefit, the beneficiary avoids to take unfair advantage of the others. In Becker’s account (1986: 105–106), an action must fulfil two criteria to be commensurate: It must be both fitting and proportional. I shall elaborate on these two criteria in some detail in this section, in order to evaluate Beslutning S. nr. 2, 06.12.94 as a reciprocal action below. I will start with Becker’s assumption that a return must be fitting, which concerns the return’s appropriateness as to type.

What *kind* of return must a beneficiary make in order to fulfil an obligation of reciprocity? What is a fitting return? I have previously explained that the concept of good is crucial in Becker’s conception of reciprocity: The moral requirement to reciprocate is defined as returning *good* for good received. Becker asserts that a fitting return is one that the initial benefactor perceives as a good, and thus rules out the possibility of making returns that are *objectively* good: ‘In general, anything that contributes to the welfare of the recipient will qualify as fitting, provided it can be *perceived as such* by the recipient [...]’ (1986: 108, italics added). The reason he gives for this is that if the return is not *actually* a good, it necessarily fails to be a return of good for good (1986: 107). To fulfil an obligation of reciprocity, therefore, the recipient must make a return that the initial benefactor perceives as valuable. Meeting

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<sup>60</sup> I will draw on Becker’s (1996) account in the following. Although Becker’s justification for the principle of reciprocity is different than the justification I adhere to, this does not cause problems.



the recipient's need will generally contribute to the recipient's welfare, and also be perceived as such.

It was noted in section 5.1.3 that the concept of 'good' is commonly understood as something that is valued or appreciated, just as Becker defines the concept. I concluded, however, that there seems to be more to this issue. Although a recipient does not *perceive* the received as beneficial, it can be beneficial in an objective sense. Is a recipient required to make returns that will be *perceived* as good upon receiving benefits that were not perceived as such? Even if a return is not perceived as good, it may nevertheless touch the initial benefactor's feeling of gratitude and happiness. It should not be ruled out, therefore, that returns that are not perceived by the initial benefactor as contributing to his or her welfare qualify as reciprocal acts, although the individual perception of what is good appears important.

While the fittingness principle concerns the return's appropriateness as to type, the proportionality criterion concerns a return's appropriateness as to quantity. What constitutes *enough* for a return to qualify as a reciprocal act? If the beneficiary is to make a return in order not to take unfair advantage of the benefactor(s), it seems that the purpose of the return must be to create a balanced relationship between the beneficiary and the initial benefactor(s). This means that the return must equal the good received (Becker 1986: 111).

Two considerations, in particular, make it difficult to assess whether a return equals the benefit received. I have already discussed these considerations when accounting for the ability-to-pay principle in section 4.3: Efforts and abilities. On the one hand, the beneficiary can put great efforts into something that barely has value to the initial benefactor. On the other hand, small efforts may result in benefits of ultimate importance. Often, this is a question of available resources and abilities. In fulfilling an obligation to reciprocate, should the beneficiary equal the benefactor's efforts or the value of the received benefit?

Becker seems inclined to consider the benefit, not the effort, determining: 'Balanced benefits [...] must be the leading concern' (1986: 112). To avoid taking unfair advantage of others, it seems reasonable that the return should equal the received. By focusing exclusively on the actual contribution, and not the ability,

however, there is a risk that the discrepancy in efforts can become great. The duty of reciprocity requires a beneficiary not to take unfair advantage of others. However, this does not necessarily imply that it would be right to require enormous efforts to equal the received. These brief remarks seem to imply that in cases where equalling a received benefit would mean to make significantly larger efforts in return, the level of effort should be considered.

#### 6.2.2 Does Beslutning S. nr. 2, 06.12.94 qualify as a return for received benefits?

I will now evaluate the Beslutning S. nr. 2, 06.12.94 in light of the moral requirement to reciprocate as reformulated in sections 5.2.2 and 5.2.3. Does Beslutning S. nr. 2, 06.12.94 qualify as a fitting and proportional return to NATO? It was noted in the previous section that while one commonly assumes that the recipient's (or initial benefactor's) perception of the received is crucial, the possibility that returns of objective value qualify as returns was not ruled out. Thus, as the concept of 'good' was defined, we should start by asking whether NATO actually perceives Beslutning S. nr. 2, 06.12.94 as promoting its welfare and interests.

There can be little doubt that NATO cannot perceive the Norwegian parliamentary resolution to participate in non-UN-mandated out-of-area operations either as valuable or invaluable in the common understanding of what it means to perceive. However, this does not imply that an assessment of Beslutning S. nr. 2, 06.12.94 is impossible. In 1994, NATO consisted of 16 members. Any security political decision taken by one ally will be favourable or unfavourable to the other allies. This implies that in determining whether Beslutning S. nr. 2, 06.12.94 qualifies as a return for received benefits, one should assess whether the resolution is favourable or not to the other *member states*.

It was noted in section 1.1 that NATO – or NATO's member states – was concerned about the importance of the United Nations' role in conferring the alliance legitimacy in the conduct of international operations at the time Beslutning S. nr. 2, 06.12.94 was passed. At the Brussels summit in January 1994, NATO reaffirmed its offer to the UN to support peacekeeping and other operations under the United Nations' auspices (The Brussels Summit Declaration, Paragraph 7). This might

suggest that the parliamentary resolution does not meet a need that the other allies have, which would imply that it does not qualify as a return for received benefits. I shall argue that Beslutning S. nr. 2, 06.12.94, in light of NATO's post-Cold War approach to security, is valuable to Norway's allies nevertheless, in three different respects at least: In terms of *freedom of action*, in terms of *predictability* and in terms of *coherence*. Recall that NATO has collective security aspirations: To promote a peaceful order in the entire Euro-Atlantic area.

Chapter 7 in the United Nations Charter gives the Security Council an exclusive competence in – and superior responsibility for – matters of international peace and security: Only the Security Council can authorise non-defensive military operations (sections 3.5 and 3.6). According to the UN Charter, therefore, any NATO out-of-area action is dependent on a Security Council resolution. Beslutning S. nr. 2, 06.12.94, however, says that it does not consider a UN mandate to be necessary for non-defensive NATO operations. By saying that Norway will participate in out-of-area operations for NATO independently of the Security Council, Norway lifts a restraint imposed on NATO by the UN Charter and whatever decisions the Security Council may take or not take. Beslutning S. nr. 2, 06.12.94 seems valuable to its allies, then, because Norway means to give NATO *freedom of action*. When holding Beslutning S. nr. 2, 06.12.94 to NATO's post-Cold War perception of threat, there can be little doubt about its value in terms of freedom of action: As the risks to NATO's security are multi-directional and multi-faceted in nature and also difficult to predict and assess, the more freely NATO members can operate, the better it is.

By saying that Norway does not consider NATO operations dependent on a UN mandate, Norway allows the decisions taken by the NATO governments to count for more than the Security Council's decisions. Hence Norway's loyalty, in questions of military operations, is stronger towards NATO than towards the UN. Norway's loyalty is indeed important to the other member states because it contributes to *predictability*. Should the alliance as a whole decide to take action without a UN mandate – no matter how likely or unlikely it seemed in December 1994 – it can count on Norwegian participation.

The explicit declaration to participate in NATO humanitarian operations, rescue operations and peace operations made by the Norwegian parliament is also evidence of a strong commitment to the other allies. Norway could solely have declared its political support of such operations, or only its commitment not to dissent to them. Norway's promise to actually take part in the mentioned kinds of operations is valuable to the other member states because deployment of troops is necessary for the accomplishment of military operations.

The commitment to participate is not only important in terms of predictability, however: For NATO governments, any decision to resort to military force – whatever the reason might be – connotes a heavy moral responsibility. The best conditions for carrying such a moral responsibility exist if NATO acts coherently. *Cohesion*, therefore, is valuable to NATO's members, and would be even more valuable should a military operation become subject to international condemnation.

It was noted in the previous section that an obligation of reciprocity requires the beneficiary to make returns that are appropriate not only as to type, but also as to quantity. This means that Beslutning S. nr. 2, 06.12.94, to qualify as a return, also must *equal* the new kinds of security benefits that Norway receives as a NATO member. It is, however, somewhat imprecise to say that this one resolution must equal the received benefit. The benefits that Norway is obligated to make returns for have come through a persistent relationship with NATO and not from an occasional receipt of benefits. This one resolution, in other words, cannot be evaluated as to make up for *all* benefits of collective security. I must therefore investigate whether the decision to participate in non-UN-mandated operations somehow meet the received benefits although it cannot equal all the benefits Norway has received.

I have previously explained that security is of vital importance to a country and that it is generally assumed that Norway's membership in NATO ensures the country's security. Membership in NATO, in other words, is very valuable to Norway. Norway has, in particular, significantly benefited from NATO's transformation and efforts to promote security in the post-Cold War era. Because the alliance has proved able to adapt to the new security challenges, Norway's security has been enhanced also after the end of the Cold War. Norway has benefited from NATO's ability to adapt to a

changed security environment, where the risks are vague and unpredictable. Therefore, there can be little doubt that predictability and cohesion is essential to Norway's allies. Moreover, freedom of action appears particularly valuable given the alliance's unstable security environment. To more precisely assess the degree of value that Beslutning S. nr. 2, 06.12.94 actually represents to NATO would require a further security political analysis, which I do not intend to accomplish here. Since the parliamentary resolution appears as a substantial return to NATO, I shall terminate on this rough estimation and conclude that there is no particular reason to believe that the return made to NATO does not meet the received benefit. On the contrary, the return appears appropriate given NATO's perception of threat. Thus, by having declared that Norway will participate in non-UN-mandated out-of-area operations, the country fulfils its obligation of reciprocity towards NATO.

### 6.3 Conclusion

This chapter has revealed that Norway is obligated to make returns for benefits that derive from NATO's post-Cold War approach to security, i.e. benefits beyond the collective defence. The chapter has demonstrated that by participating in non-UN-mandated out-of-area operations, Norway fulfils this obligation. Since there is no contractual basis for an obligation to enhance NATO's post-Cold War approach to security, we now clearly see the importance of the obligation of reciprocity for NATO: The obligation of reciprocity is the moral glue, keeping the alliance together by requiring the alliance members to make returns for received benefits.



## 7 THE REQUIREMENTS OF INTERNATIONAL LAW VERSUS THE REQUIREMENTS OF NATO MEMBERSHIP

I have previously argued (sections 1.2 and 2.4) that the research question in this thesis – whether the Storting passed a morally justifiable resolution when it decided that Norway would participate in NATO out-of-area operations that are undertaken without a Security Council mandate – must be answered by investigating its premises. In chapter 3 I investigated the premise that Norway does not breach the rules concerning the resort to military force in international law by participating in non-UN-mandated out-of-area operations. A thorough account of these rules demonstrated that this premise is invalid: Participation in non-UN-mandated out-of-area operations is unlawful according to the UN Charter and no customary rule of international law has replaced the Charter's provisions.

In chapters 4, 5 and 6 I explored the premise that Norway is obligated towards NATO to participate in non-UN-mandated out-of-area operations. While chapter 4 demonstrated that burden-sharing principles do not establish whether Norway is obligated to participate in such operations or not, chapters 5 and 6 demonstrated that the premise is valid: The moral requirement to reciprocate imposes a duty on Norway to make returns to NATO for received benefits, and Norway fulfils this duty by participating in out-of-area operations that the Security Council has not mandated.

These conclusions imply that the Storting faced a situation where two requirements pointed the Storting in opposing directions. Participating in non-UN-mandated out-of-area, which the duty towards NATO requires, is in conflict with fulfilling the obligation to adhere to rules of international law. Likewise, fulfilling the duty to adhere to rules of international law will dissatisfy the duty to make returns for received benefits. Hence, the Storting could not fully meet both duties. This situation may be characterised as a tragic dilemma, which means that

in some sense, whatever one does, one does a wrong; this is to be contrasted with ordinary choice between equally good alternatives, where whichever one chooses one is not doing a wrong.  
(Dancy 1993: 125)

Since the requirements pointed Norway in opposing directions it is not, at this stage, possible to conclude as to whether the Storting passed a morally justifiable resolution. As suggested at the end of section 2.4, I must subject the moral requirements to scrutiny again in order to determine whether Beslutning S. nr. 2, 06.12.94 is morally justifiable or not. In addressing this question, it is important to consider whether the Storting had *adequate reasons* for giving priority to the obligation towards NATO to the detriment of the obligation towards the international community and to consider whether the Storting should have acted differently.

The investigation of the premises upon which Beslutning S. nr. 2, 06.12.94 rests has demonstrated that two obligations apply to Norway: An obligation not to breach rules of international law and an obligation not to take unfair advantage of others. As I will soon demonstrate, these requirements have the character of *deontological* claims: They issue absolute prohibitions and require Norway to act on a principle. This raises the question of whether conflicts between deontological requirements can be solved. Is it possible to settle conflicts between conflicting deontological requirements?

## 7.1 Can deontology solve the moral dilemma?

The core idea of deontology is that what makes an action morally right is that it complies with a correct moral rule or principle. This means that in a deontological perspective, what is morally right can be specified by rules (Larmore 1987: 4). Deontology, however, does not give guidance about how to act until one knows what to count as a correct moral rule or principle. What are correct deontological rules or principles? Central to deontologists is that there are certain things that we must never do towards others. We must respect others as ends in themselves, never simply as means.<sup>61</sup> Since we are to treat other people as ends in themselves, a correct moral rule must be one prescribing actions that imply treating every individual as having an ultimate source of value. In requiring people to act on principles or rules,

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<sup>61</sup> This is Kant's second formulation of the categorical imperative in *Groundwork of the Metaphysics of Morals*. To Kant, a correct moral principle must also be universalisable: 'Act only according to that maxim by which you can at the same time will that it should become a universal law' (Kant 1785/1994: 274). It implies that correct moral principles only prescribe actions that can be made moral rules of *general* application. In this account, however, I shall focus on the deontological notion of treating others as ends in themselves. It is common to interpret that notion as applying only to *persons*. However, Kant's moral theory allows for an extension of the individual morality, and hence the duty to treat other individuals as ends in themselves can be said to have direct application to states as well (Donaldson 1992: 141).



deontological claims issue absolute prohibitions: ‘Do not lie’, ‘do not break promises’, but also commands: ‘Tell the truth’, ‘keep your promises’.

In *The Metaphysics of Morals*, Kant distinguishes between so-called perfect and imperfect duties. Perfect duties either prohibit or command *specific* acts; they leave little leeway as to how to discharge them (Baron 1997: 16). The deontological claims ‘do not lie’ and ‘do not break promises’ are examples of perfect duties. Imperfect duties, on the other hand, do not specify what specific actions that are required. They are duties to promote certain ends: The happiness of others and the perfection of oneself (Baron 1997: 18). According to Kant, however, the rule associated with imperfect duties cannot completely specify what actions should be done to satisfy the duty (Larmore 1987: 13). The moral duty of benevolence, for example, is a duty whose rule appears too schematic to settle by itself how it is correctly carried out (Larmore 1987: 5–6).

The obligations to respect international law and to make returns for received benefits are deontological claims: They require Norway to treat members of the international community and members of NATO respectively as ends in themselves. I explained in chapter 3 that states are obligated to adhere to rules of international law because they promise other states to behave in a certain manner when they make agreements with them. When Norway ratified the UN Charter, it promised other states not to resort to military force unless the country itself or one of its allies is subjected to an armed attack or unless the Security Council has mandated military operations under the provisions of Chapter 7. To treat the international community as an end in itself, Norway must keep this promise. Hence, the obligation to adhere to rules of international law may be specified as the following deontological rule: ‘Do not break a promise’.<sup>62</sup> This duty itself specifies the claim it has on Norway’s actions: Norway must not breach the Charter provisions. Accordingly, the duty towards the international community is a perfect duty.

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<sup>62</sup> It was noted in section 5.2.2 that the principle of reciprocity and the principle of fair play are other possible justifications for the obligation to adhere to rules of international law. I will not rule out the possibility that the duty of reciprocity also imposes an obligation on Norway to adhere to rules of international law. Since Norway has ratified the UN Charter and since the Charter expresses valid law, however, the grounds for Norway’s obligation towards the international community is clearly consent.

In chapter 6 it was demonstrated that the justification for the principle that one should make returns for received benefits is not to take unfair advantage of others. Having received benefits as a NATO member, Norway must make returns to NATO to treat its allies as ends in themselves. Hence, also the obligation to make returns for received benefits may be specified as a deontological rule: ‘Do not take unfair advantage of others’. This requirement has the character of an imperfect duty because it does not itself specify how it is to be fulfilled. I explained in chapter 6, however, that Norway, to meet the received benefit, should participate in non-UN-mandated out-of-area operations. In this case, the Storting has placed itself in a moral dilemma: It has incurred two duties that conflict with each other. If the promise towards the international community were to be kept, it ought not have accepted NATO benefits on the behalf of the Norwegian population generating a duty to participate in out-of-area operations.

In requiring individuals to always act on rules or principles, deontology gives more or less precise action guidance, depending on whether a perfect or an imperfect duty is at stake. But what action guidance does this ethical theory give when a moral agent faces a moral dilemma? How are moral conflicts to be solved? Can deontology solve Norway’s moral dilemma?

The Kantian moral theory does not admit the existence of moral conflicts at all. The reason is that deontological claims are assumed to always be in harmony with each other. According to Kant, ‘a collision of duties and obligations is inconceivable’ (1797/1991, 224). In the case at hand, however, Norway does in fact face a moral dilemma: The Storting cannot emerge from the situation without breaching the instruction to treat others as ends in themselves. It must either break a promise made towards the international community or take unfair advantage of its allies.

While Kant denied the possibility of conflicting duties, other deontological positions recognise that what seems to be moral dilemmas may actually arise. A central feature of this position is the belief that moral dilemmas are only apparent or *prima facie*: For any given dilemma, there will be one, correct decision to be made (Hursthouse 1999: 44–45, 52; Larmore 1987: 10). In order to determine whether the Storting made ‘the one correct decision’, one should identify a higher-order rule

establishing how a conflict between the first-order rules ‘do not break a promise (towards the international community)’ and ‘do not take unfair advantage (of your allies)’ is to be solved. The insistence on such an explicit decision-procedure should be understood as a reaction to what the deontologists perceived as the intolerable vagueness of Aristotle’s approach to *phronesis*<sup>63</sup> or moral wisdom and the unsatisfactory notions of intuition, insight and perception (Larmore 1987: 4–5, Hursthouse 1999: 53). The assumption is that normative ethics should be stated in such terms that any person could identify the correct solution to any dilemma only by adhering to the identified rules.

Some deontologists have argued in favour of ordering moral duties by considering their *decisiveness*, the assumption being that some deontological claims are more important than others. W. D. Ross is one proponent of this position, and he gives the following example of a situation in which one deontological duty is more decisive than another:

If I have promised to meet a friend at a particular time for some trivial purpose, I should certainly think myself justified in breaking my engagement if by doing so I could prevent a serious accident or bring relief to the victims of one. [...] When I think it right to do the latter at the cost of not doing the former, it is [...] because I think it the duty which in the circumstances is *more of a duty*’ (1930/1994: 334, italics added).

This example suggests that the Storting made a morally right decision if the duty not to take unfair advantage of others is ‘more of’ a duty than the duty to keep promises towards the international community. How does one determine whether one deontological duty is ‘more of’ a duty than another?

To Ross, what seems important is that the premises on which the promise was made have changed.<sup>64</sup> He can justifiably *break* the promise because the duty to prevent a serious accident or bring relief to the victims of one,<sup>65</sup> which is more of a duty, arises. Hence, Ross can give priority to the duty of benevolence.

What makes the duty of benevolence a more decisive duty? Ross does not justify his choice by referring to a deontological rule. When Ross concludes that one

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<sup>63</sup> *Phronesis* is the Greek word for wisdom and a crucial concept in Aristotle’s philosophy.

<sup>64</sup> Ross rejects that the second duty is more of a duty on utilitarian grounds; that it leads to better consequences overall (1930/1994: 334).

<sup>65</sup> This is a deontological duty of benevolence.

duty is ‘more of’ a duty than the other, it seems reasonable to assume that he has considered the particularity of the situation: ‘How important is the promise that I have made?’ ‘What does benevolence actually require from me in this particular situation?’ These questions imply that because morality is complex, the duties cannot be ordered in a hierarchical system on general grounds. It thus seems as if an absolute ranking of the two deontological duties is implausible. Likewise, there is reason to question whether an absolute ranking of the duty to keep promises and the duty not to take unfair advantage of others is possible.

Rosalind Hursthouse (1999: 40) explains that there is an increasing sense in philosophy that the enterprise of coming up with a set of rules or principles for solving moral dilemmas has failed.<sup>66</sup> When facing conflicting deontological claims, therefore, it seems like one has to renounce a procedure preoccupied with general principles and rules. Rather, when facing a conflict situation, to apply certain rules rather than others and to weight and balance competing considerations correctly requires that the moral agent exercise *moral judgment* to find the best solution to the situation at hand (Hursthouse 1999, Larmore 1987).

## 7.2 Can exercising moral judgment solve the moral dilemma?

Moral judgment offers a way to resolve moral dilemmas ‘by arguments, by appeal to reasons’ (Larmore 1987: 14). Moral judgment is both an ability to and a method for making considered or well-founded decisions: To elaborate and appraise different courses of action in order to learn what *in a particular situation* is indeed the morally best thing to do (Larmore 1987: 12). Appealing appropriately to reasons, however, presupposes that an individual makes use of certain personal abilities: ‘Moral sensitivity, perception and imagination’ (Scheffler quoted in Hursthouse 1999: 54).

The most common critique levelled against the recourse to moral judgement in moral deliberation is its apparent vagueness. How, precisely, does one ‘appeal to reasons’? Why should one place confidence in decisions that are not based on specific

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<sup>66</sup> Note that although an absolute ranking of the duties appears implausible within deontology, utilitarianism insists on solving moral dilemmas by applying the higher-order principle of utility, in requiring the moral agent to always pursue the course of action leading to the best consequences overall.

criteria such as rules or principles, but simply on ‘reasons’? The advantage of exercising moral judgment is that it allows one to capture the particularity of a given situation. To exercise moral judgment permits the thinker to consider all relevant considerations and to invent creative solutions to moral problems. I shall proceed on the assumption that normative ethics is more fruitful and more apt to produce valid conclusions not by adhering to a specific decision procedure, but by relying on moral judgment, wisdom or *phronesis*.

Individuals who recourse to moral judgment to know what is the morally right thing to do in a particular situation and who employs the faculties of moral sensitivity, perception and imagination are often said to act virtuously or to be virtuous: These individuals find what is appropriate to do in a given situation. Sometimes the particularity of a situation requires honesty, sometimes respect. For this reason, the virtues, such as honesty and respectfulness, could be said to express what a virtuous agent person characteristically would do in a given situation (Hursthouse 1999: 28–29), having considered the relevant reasons.

An individual who exercises moral judgment will generally keep promises because, having made promises, will find that it is disrespectful, unfaithful and irresponsible not to keep them. While disrespectfulness, unfaithfulness and irresponsibility are vices, respectfulness, faithfulness and responsibility are virtues. Moreover, an individual who benefits from membership in an organisation will, when exercising moral judgment, generally find that it is right to make returns. Having accepted benefits, not to make returns would be to take unfair advantage of others. Unfairness and abuse are vices, while fairness and praise are virtues.

As noted in section 7.1, Norway has made a promise and then incurred a duty to make returns that conflict with the promise. The country has thus placed itself in a situation where being both respectful and fair is impossible: The different virtues – just like the deontological requirements – point Norway in opposing directions. This raises the question of whether the Storting acted virtuously when choosing fairness towards NATO to the detriment of respectfulness towards the international community. What *reasons* suggest that to avoid taking unfair of Norway’s allies, all things considered, was better than keeping the promise? Were there adequate reasons for giving priority

to the obligation towards NATO? In addressing this question, I will return to the parliamentary debate and examine the reasons that the members of the Storting themselves considered when considered before passing Beslutning S. nr. 2, 06.12.94.

### 7.2.1 The majority's failure to recognise conflicting duties

When accounting for the parliamentary debate that preceded Beslutning S. nr. 2, 06.12.94 in section 2.2, I explained that the Storting's majority passed its resolution on an assumption that Norway's membership in NATO requires that Norway participates in out-of-area operations, even if the Security Council has not mandated such operations. The moral requirement to reciprocate imposes a duty on Norway to make returns for received benefits, and Norway fulfils this duty by participating in non-UN-mandated out-of-area operations. Hence, the Storting's majority was right in assuming that Norway has a duty to participate in such operations. While the obligation towards NATO was considered, the official report of the proceedings in the Storting shows that the majority did not direct its attention to the potential unlawfulness of non-UN-mandated out-of-area operations. The requirement towards NATO, therefore, was the only argument that the majority considered before passing the vote. This is more problematic than it may at first seem.

The Storting, being Norway's principal decision-making body, should be informed about the country's obligations towards other states. In this case, the members representing the majority acted as if they were not informed about Norway's obligation to adhere to the rules of the UN Charter since they did not mention the possibility that Norway, by passing the resolution, would render itself guilty of violation of these rules. The members constituting the majority must have been aware that the decision they were about to take could bring the duty to adhere to rules of international law into disfavour, however: On several occasions during the debate, the minority opposed the resolution by referring to its unlawfulness.

The possibility exists that the majority questioned the validity of the minority's arguments and assumed that the resolution was lawful. If that was the case, the crucial notions of moral sensitivity, perception and imagination suggest that the members representing the majority should have investigated the issue of lawfulness to the full

instead of ignoring it. A person who applies the mentioned faculties will understand that it is important to take other persons' arguments seriously. When reasoning from moral sensitivity and perception, one will open one's mind to different kinds of considerations and will acknowledge that there can be several answers to a given question. In other words, one will realise that one's own beliefs can be incorrect.

When ignoring the arguments put forward by the minority members, the majority members *deliberately* disregarded an important consideration. To deliberately leave out a counter-argument is particularly problematic when it is done by the very persons who have been elected to exercise a primary responsibility for the nation. These persons' daily work consists in taking decisions to direct society in the right direction. Moreover, the seriousness of the issue under consideration – the resort to military force – also suggests that it was imperative to take into account every relevant consideration. The failure not to do so came about because the majority's members did not exercise moral judgment.

When disregarding the arguments put forward by the minority's members, the majority's members did not only show disrespectfulness. They also showed carelessness towards the issue in question and precluded themselves from observing all relevant considerations, and passed Beslutning S. nr. 2, 06.12.94 on incomplete reasons. This means that the members representing the Storting's majority 'opted for' one course of action rather than 'exercised choice'.<sup>67</sup>

### 7.2.2 A better solution to the dilemma?

The Storting had to choose between breaking a promise made towards the international community and taking unfair advantage of the other NATO members. In the situation that the Storting had placed itself, it would do a wrong no matter how it acted. This is not to say, however, that the given courses of action were *equally* wrong. In determining whether the Storting had adequate reasons for giving priority to the obligation towards NATO, it seems crucial to determine whether it did the least harm possible: If it was possible to escape the moral dilemma by doing less harm, the

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<sup>67</sup> I borrow these expressions from Hursthouse (1999: 71).

Storting should not have passed Beslutning S. nr. 2, 06.12.94 in the adopted form. Since the Storting passed the resolution based on incomplete considerations, an examination of all relevant considerations might reveal that the Storting was lucky enough to have opted for the best course of action, but it might also reveal that there was reason to choose a different course of action.

The promise towards the international community consists in refraining from the resort to military force. This constitutes the perhaps most important promise that a state can make towards other states because it is a guarantee not to cause them human suffering and material damages. The UN Charter was adopted as the Second World War was coming to end to prevent similar cruelties from happening again. Moreover, the promise is a perfect duty and can only be fulfilled by following the provisions in the UN Charter. Norway, to keep the important promise towards the international community, must not resort to military force unless the country or one of its allies has been subjected to an armed attack or if the Security Council has authorised it. Fulfilling the obligation towards NATO to participate in out-of-area operations that the Security Council has not authorised clearly contradicts the instructions that the international legal obligation gives.

The duty not to take unfair advantage of others, however, is an imperfect duty and does not itself specify what actions must be undertaken in order to fulfil it. This means that it might be possible to fulfil the duty in different ways. Could the Storting have chosen to pursue a different course of action and thereby have caused less harm? Is adhering to rules of international law possible without dissatisfying the obligation towards NATO altogether?

NATO exists with the one aim of enhancing the member states' security. To achieve security, NATO makes use a variety of different measures. Some measures relate to the collective defence. Crisis management and peace operations beyond NATO territory, however, are among NATO's most significant new measures in promoting a peaceful order in the Euro-Atlantic area, and were established to meet the changed security threats in the 1990s. Norway has benefited from NATO's efforts at enhancing security in an unpredictable security environment. These were the reasons given for Norway to participate in non-UN-mandated out-of-area operations.



NATO's reliance on crisis management and out-of-area operations in enhancing the new security challenges does not necessarily imply that participation in non-UN-mandated out-of-area operations is the only way in which Norway could make returns for received benefits, however. Other tasks are also important to the alliance. Norway could, for instance, participate in out-of-area operations that have been mandated by the Security Council. Other possible lawful returns would be to participate in peacekeeping operations, make economic contributions to the alliance, promote a fruitful dialogue with NATO's adversaries and promote NATO's policy of support for arms control, disarmament and non-proliferation. These measures also play a major role in the achievement of the alliance's security objectives. As these contributions are lawful, they could have been made without dissatisfying the obligation to adhere to rules of international law. Hence, by making these contributions to the alliance, Norway would not cause harm towards the international community.

Although the mentioned contributions would be valuable to the other NATO members, they might not fully meet the obligation of reciprocity. Making contributions to NATO's budgets, co-operation with adversaries, peacekeeping operations and arms control would not give NATO an equal degree of operational flexibility as participation in non-UN-mandated out-of-area operations would. Since Norway has benefited from NATO's ability to adapt to a changed security environment, where the risks are vague and unpredictable, it seems that operational flexibility is what Norway should give in return. This implies that although there were other ways of fulfilling the moral requirement, these ways do not seem to fully meet the obligation towards NATO.

Even though the contributions would only *partially* meet the obligation towards NATO, however, it was possible for the Storting to make up for the wrongdoing of not participating by making different kinds of contributions to NATO. Making up for the broken promise, however, appears challenging, if not impossible. What kind of move towards the international community could possibly compensate for the harm that a threat of military intervention without a UN mandated represents?

While keeping an important promise was possible without dissatisfying the obligation towards NATO altogether, fairness towards NATO was incompatible with

the obligation towards the international community. The particularity of this situation thus points Norway in another direction than the one it actually opted for: There was another solution to the dilemma that consisted in doing less harm. Hence, if the Storting had pursued the other possible course of action, it would have acted better.

### 7.3 Conclusion

In this chapter I have argued that deontology seems unable to come up with general principles for adjudicating conflicting deontological duties. Hence, it seemed that deontology could not order the two duties that apply to Norway. In order to determine whether one deontological duty is more decisive than another, I argued, one should consider the particularity of the situation. This should be done by exercising moral judgment, which requires that one makes use of the faculties of moral sensitivity, perception and imagination. In order to determine whether the Storting had adequate reasons for giving priority to the obligation towards NATO, I returned to the debate in the Storting before Beslutning S. nr. 2, 06.12.94 was adopted. This account demonstrated that the members representing the Storting's majority did not exercise moral judgment, as they passed Beslutning S. nr. 2, 06.12.94 on incomplete considerations. Hence, the Storting did not demonstrate the existence of adequate reasons for giving priority to the duty towards NATO over the duty to towards the international community.

Consideration of all relevant arguments in this particular situation demonstrated that the Storting could have done less harm by acting differently. While keeping an important promise was possible without dissatisfying the obligation towards NATO altogether, fairness towards NATO was incompatible with the obligation towards the international community. Hence, adequate reasons for giving priority to the obligation towards NATO to the detriment of the obligation towards the international community did not exist. For this reason, Beslutning S. nr. 2, 06.12.94 should not have been passed in the adopted form.

Since the Storting passed the vote upon incomplete considerations and did not pursue the best course of action available, I will conclude that it did not adopt a morally justifiable resolution when passing Beslutning S. nr. 2, 06.12.94.

## EPILOGUE

When passing Beslutning S. nr. 2, 06. 12 94, the Storting adopted a resolution that was not morally justifiable and made a decision that should not have been made. Nevertheless, the Storting did give priority to the duty towards NATO, and thereby promised its allies that Norwegian forces would participate in unlawful military operations. During the eight years that have passed since the Storting adopted the resolution, Norway has participated in two NATO out-of-area operations that lack formal Security Council authorisation: In Kosovo in 1999 and presently in Afghanistan. This implies that Norwegian authorities consider themselves bound by the promise made on 6 December 1994. The military operation in Kosovo was conducted with reference to humanitarian considerations. Although such considerations might suggest that the bombing was justified on moral grounds, it ran counter to the provisions of the UN Charter. The military operation in Afghanistan is being conducted with reference to the international legal right to collective self-defence, but the permanence of NATO's action in Afghanistan, for one thing, gives reason to question its lawfulness.

Does the Storting's promise towards NATO bind Norway to participate in unlawful military operations? While this thesis has assessed the *justifiability* of Beslutning S. nr. 2, 06.12.94, the question implies that the Storting cannot be obligated to undertake unlawful actions. This concerns the *validity* of the resolution, and I will therefore devote a few remarks to this issue. Can Norway be obligated to carry out actions that breach rules of international law?

My review of the official report of the proceedings in the Storting and other official documents has not revealed any particular reason to believe that Beslutning S. nr. 2, 06.12.94 was passed as a consequence of NATO exercising pressure towards Norwegian authorities. Rather, my investigation has shown that the resolution was passed because the Storting felt an obligation towards NATO to make this contribution

to the alliance. There is thus reason to suppose that the promise towards NATO was voluntary.

Is Norway obligated towards NATO to carry out unlawful actions when the promise to do so was voluntary? A common principle of law states that an individual is never bound by a promise to carry out unlawful actions and thus suggests that Norway is not obligated towards NATO in this respect.

If the Storting's promise towards NATO implies that Norway should undertake actions that are evil, this principle appears straightforward and there cannot be doubt that Beslutning S. nr. 2, 06.12.94 does not bind. The reasons that were given for participation in non-UN-mandated out-of-area operations, however, were humanitarian considerations and collective self-defence. These are morally permissible, even praiseworthy, actions. If the actions that follow from the promise are morally permissible or even praiseworthy, why should Norway not be bound by the promise?

If a promise involves doing something unlawful, but morally praiseworthy, the only reason it should not bind is that upholding the law's normative force is more important than performing morally good actions. At the international level, this means that the consideration of upholding the normative force of international law nullifies unlawful political declarations, even though they may express morally praiseworthy intentions.

One possible justification for legislation to take precedence over actions that are morally praiseworthy is that it reflects a more comprehensive perspective on normative questions than morality alone provides (see Malnes 1994: 135). Contemporary rules of international law were designed upon the consideration that a too extensive right to the resort to military force might lead to a backslide: The rules were established to prevent that the cruelties of the Second World War would be repeated. Therefore the allowance for the resort to military force was to be strict.<sup>68</sup> It might be tempting to break these strict rules for a good cause: The veto power within the UN Security Council, for example, could make it difficult for NATO to react timely and efficiently to international crises. In a long-term perspective, however,

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<sup>68</sup> This is the slippery slope argument that I referred to in section 3.1.

neglecting the rules concerning the resort to military force in international law might lead to an undermining of these rules. This could produce uncertainty about the barrier for the resort to military force and unpredictability in the international society.

These brief remarks imply that it is important to uphold the normative force of international law, which suggests that promises implying unlawfulness are invalid. Norway's promise to participate in unlawful operations made towards NATO 6 December 1994 should therefore not bind.

During the last years NATO has undertaken two military operations of questionable lawful validity. The war against terrorism, which is a new and important dimension to NATO's security policy, does not give reason to believe that NATO will refrain from such actions in the future. It seems that NATO could be in the process of developing a *general* practice that runs counter to international law. Such unlawful practices are a threat to the international community because they might cause the prevailing international norms system to be undermined. By participating in such operations, Norway contributes to this undermining. As a concluding remark: Not only has the previous discussion suggested that Norway's promise towards NATO is invalid, these remarks also give reason to ask whether Norway even has a moral duty to *oppose* unlawful practices.



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